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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 MICHAEL PICARELLA,

4 Plaintiff,

5 v.

14 CV 4463 (ALC)

6 HSBC (USA) SECURITIES, INC.,

7 Defendant.

8 -----x

New York, N.Y.
December 14, 2016
9:03 a.m.

10 Before:

11 HON. ANDREW L. CARTER,

12 District Judge

13 APPEARANCES

14 LIDDLE & ROBINSON LLP
15 Attorneys for Plaintiff
16 BY: JAMES R. HUBBARD
BLAINE H. BORTNICK

17 BOIES, SCHILLER & FLEXNER LLP
18 Attorneys for Defendant
19 BY: RANDALL W. JACKSON
DAVID L. SIMONS
NICHOLAS STANDISH

20 GIBSON, DUNN & CRUTCHER LLP
21 Attorneys for Defendant
22 BY: GABRIELLE F. LEVIN

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(Trial resumed; jury not not present)

THE COURT: Your Honor, Ms. Palmieri is not here. She has an arbitration matter this morning and I would ask if you could excuse her.

THE COURT: That's fine.

Are we ready? So we received the objections that counsel had to the jury instructions last night. First, let me deal with plaintiff's objections. I understand the primary objection is just sort of renewing their objection to the use of the phrase "motivating factor" instead of "plays no role."

Just give a little further elucidation as to my thinking on that. I am relying in large part on a decision by my distinguished colleague Paul Engelmayer in the case of Heather Ann Bivens v. Institute for Community Living, et al. It's 14 CV 7173 reported at 2016 U.S. District LEXIS 13538. In that decision Judge Engelmayer very thoroughly discusses the fact that those terms are used as synonyms, essentially "motivating factor" and "plays no role," and points to the fact that in some of the cases that plaintiff is relying on, in particular Williams, the word "motivating factor" was used; in footnote 27, there is the use of the word "motivating factor." So I will use the word "motivating factor." Plaintiff's objection is noted.

I don't believe there are any other real objections by plaintiffs.

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1 MR. HUBBARD: Yes, your Honor. There is a very
2 serious objection.

3 THE COURT: What's that?

4 MR. HUBBARD: Your Honor, as we said in our letter
5 last night, first I want to go to the verdict form. And as we
6 say in our letter, your question number five is we say not
7 permissible because if the answer to number four is yes, then
8 there can't be a five. There can't be a non-retaliatory
9 reason -- if the jury has determined that retaliation or animus
10 was a motivating factor or the protected activity was a
11 motivating factor, then there can't be any exoneration;
12 otherwise it's but for causation. The same thing happens in
13 the instruction. If you go to instruction (f), non-retaliatory
14 reasons, at page 31. That essentially is, you give that
15 instruction after the jury has been told what the causation
16 charge is under the city law, the motivating factor test. So
17 it's a redo -- it's a do-over. And we say that it can't be
18 done. It turns -- the non-retaliatory reason section turns
19 this instruction into we say a but for causation charge. I
20 know the Court certainly didn't intend that and may disagree.

21 But if on the verdict form the jury finds yes for
22 number four, then it's not possible for the jury to conclude to
23 the contrary that they did it for non-retaliatory reasons
24 because the jury has already concluded that they did it for
25 retaliatory reasons.

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1 And so we appreciate the Court's diligence with this.
2 This is not an unconfusing area, as you have pointed out, and
3 there has been a lot of writing on this subject, including
4 Judge Engelmayer's case that you point out to us.

5 But I do think that it would be a serious mistake to
6 proceed to the -- the thing that the defendants are proposing,
7 the non-retaliatory reason excuse. That does not fit within
8 the motivating factor analysis. It does not fit within the
9 playing a part analysis. Once it plays a part and once it's a
10 motivating factor, you can't get out the door by arguing that
11 you had non-retaliatory reasons because -- I could just go
12 through the instruction.

13 THE COURT: I think plaintiff has a point. What's
14 defense counsel's position on that, that perhaps number five is
15 superfluous.

16 MS. LEVIN: Your Honor, good morning. First, let me
17 thank the court for the significant amount of time it's put
18 into the verdict form and instructions and the careful
19 consideration that it's given them.

20 With respect to question five on page four we don't
21 believe that it's superfluous because plaintiff seems to be
22 arguing that he's only entitled to meet the first four elements
23 of his prima facie case and if he satisfies that he wins and
24 that's not what the law is. Courts are not here to second
25 guess legitimate non-retaliatory business decisions. And if

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1 the defendant shows that it would have made the same decision
2 in the absence of protected activity then I think that the jury
3 is entitled to find for the defendant.

4 MR. HUBBARD: That, of course, is a Title VII but for
5 standard, your Honor. And it's not applicable under the city
6 statute.

7 MS. LEVIN: It's not the but for standard, your Honor,
8 because the but for standard is that the protected activity had
9 to be the reason for the adverse employment action and the but
10 for clause.

11 Here what I'm saying is that even if there had been
12 protected activity -- even if there had not been protected
13 activity, I'm sorry, that if the employer would have made the
14 same decision regardless of protected activity, because it was
15 a legitimate business decision, then the plaintiff cannot
16 prevail.

17 THE COURT: I'll take that under advisement. Were
18 there other objections by plaintiff's counsel?

19 MR. HUBBARD: Your Honor, I don't think anything -- we
20 noted the absence of the EEOC charge as protected activity in
21 our letter and we're comfortable leaving that to the Court's
22 judgment as to whether that should be added back in.

23 THE COURT: Okay.

24 Let's turn to the defendant's objections.

25 In terms of the first objection, pages 22 and 23,

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1 there are references, as well as footnote three, there are
2 references to the New York State Human Rights Law. It does
3 seem we need to take those out.

4 As to number two, the defendant suggests that we
5 substitute "solely" for "in fact" and "solely" later on. It
6 seems to me that that is taken care of in the later portion of
7 the instructions when it starts telling the jury to look at if
8 there were -- if this was totally but for causation is taken
9 care of later on in there. So it does seem to me that we don't
10 need to make that change. Let me hear from defendants further
11 on that.

12 MS. LEVIN: Absolutely, your Honor. The issue here is
13 just the references to "motivated by" in the section dealing
14 with causation under Title VII. We had attempted to suggest
15 some language for the Court's convenience. We're not wedded to
16 that language. But we were -- we just wanted to better
17 understand the reason for the references to "motivated by" in
18 the section dealing with but for causation.

19 THE COURT: It may be that -- I believe that we did
20 discuss the word "solely" yesterday, which I remember. I think
21 that that was the word that was discussed. So perhaps we
22 should make that change.

23 What's plaintiff's counsel's position on that? I
24 believe that the "solely" came from plaintiff's counsel. That
25 may have been in a different section.

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1 MR. HUBBARD: Your Honor, I don't remember. May I ask
2 Mr. Bortnick. I remember the discussion.

3 MR. BORTNICK: That came up in the context of well
4 your Honor saying I'm not going to get rid of jury verdict
5 number I think it's 5 in this one, it was 13 in that one. You
6 said: Well, what about solely? I said in a sense it makes it
7 better but I still have the problem with the "would have taken"
8 and the but for issue which Mr. Hubbard has raised, but that's
9 the context it came up in, that it was better than what was
10 there before but still objectionable. That was the issue and
11 how it came up.

12 THE COURT: But this was for this section, correct?

13 MR. BORTNICK: It was for the city statute on the
14 verdict form old question 13 which is now --

15 MR. HUBBARD: We're not talking about that.

16 MR. BORTNICK: Yeah, but he's asking what it was
17 yesterday, what we were talking about.

18 THE COURT: What's plaintiff's position on that and
19 whether we should make this "solely" or leave it as "in fact"?

20 MR. HUBBARD: I preferred the earlier language, your
21 Honor. The "solely" moves more into sort of diluting the
22 motivating factor portion of the instruction or the but for
23 portion of the instruction.

24 MR. BORTNICK: Your Honor, on page 22 we're talking
25 about the Title VII claim so it's a different context. So

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1 yesterday's "solely" had nothing to do with this.

2 THE COURT: Correct. So I think we just leave it as
3 "in fact." I think that's easier. Just leave it as "in fact."
4 I don't think there's a real difference there.

5 Next objection by defendants. Number three on page
6 26. It does seem that in terms of the at least in part --

7 MS. LEVIN: I'm sorry to interrupt, your Honor. There
8 was one additional change at the top of page two of our letter
9 which references page 24 of the proposed instructions. This is
10 a slightly -- it's another reference to motivating factors but
11 it's a slightly different issue because, again, it seems to
12 incorporate the motivating factor causation standard in the
13 Title VII claim. I believe the language should read that
14 "HSBC's explanations are pretextual and were not, in fact, the
15 real reason or the but for cause for the alleged adverse
16 actions."

17 THE COURT: What's plaintiff's position on that?

18 MR. HUBBARD: I'm just trying to find it, your Honor.

19 THE COURT: Page 24.

20 MR. HUBBARD: It's on page 26, I think.

21 THE COURT: We're talking about the bottom of page 24.

22 MR. HUBBARD: I'm sorry.

23 The last sentence, your Honor, on page 24,
24 "Mr. Picarella claims that HSBC's explanations are pretextual,
25 that is that they are unworthy of belief and were not, in fact,

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1 motivating factors." That's kind of inconsistent. That seems
2 to be just the opposite. If the claim -- and our claim is not
3 pretext. As your Honor knows, we don't argue pretext in the
4 legal sense. But -- claims that the explanations are
5 pretextual; that is, they are unworthy of belief. If they are
6 unworthy of belief, then -- I'm just getting confused about --
7 it seems that they're inconsistent. Pretext is confused with
8 motivating factors. I don't understand the relationship
9 between the two.

10 THE COURT: What their objection is as to the use of
11 the word "were not in fact motivating factors," that phrase
12 instead of "were not the real reason for the alleged adverse
13 actions." And what the defendants are objecting to is the use
14 of the word "motivating factors" in this Title VII section
15 because under Title VII's but for causation, not motivating
16 factors.

17 MR. HUBBARD: I'm okay with that, Judge.

18 THE COURT: So we'll make that change to "were not the
19 real reason for the alleged adverse actions."

20 The next one on page 26. The "at least in part." Let
21 me give plaintiffs a chance to look at that, see what your
22 position is on that.

23 MR. HUBBARD: That instruction is absolutely correct
24 and that's what we've argued the law is and we certainly object
25 to that being changed. That's an important part of the

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1 instruction.

2 THE COURT: They're just objecting to the "at least in
3 part." They're saying that should come out.

4 MR. HUBBARD: That's exactly what Judge Engelmayer is
5 saying, they're the same thing, Judge, and we shouldn't be
6 deprived of the "in part" language. That's the state law and I
7 obviously don't have that other decision in front of me, your
8 Honor has seen it, but it seems to me it's consistent with I
9 think you said Bivens. Perhaps I got the case wrong.

10 THE COURT: Yes, you did.

11 MR. HUBBARD: But obviously we've read the case. And
12 I don't have it in front of me. And I think it's consistent --
13 it's certainly consistent with the "a motivating factor"
14 concept. So we would think that that's an important part of
15 the instruction.

16 THE COURT: What's defendant's position on that? I
17 tend to agree with plaintiff's counsel.

18 MS. LEVIN: I think the issue, your Honor, is that
19 this discussion is in the Title VII portion of the instructions
20 and that was why we objected to the "in part" because for the
21 Title VII claim it's not motivating factor it's but for. And
22 that was why we objected to the inclusion of the phrase "in
23 part" or "at least in part."

24 THE COURT: Hold on a second.

25 MR. HUBBARD: I might try to make a deal with defense

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1 counsel, your Honor. I think that it may well be that the "in
2 part" is more appropriate in the city instruction. We argued
3 that yesterday and I know your Honor has that and it may be
4 that in the Title VII instruction we should just leave it as
5 because he engaged in protected activity.

6 THE COURT: Okay. We'll do that. We'll take out the
7 "at least in part."

8 MR. HUBBARD: And, of course, we've been through the
9 argument about the motivating factor instruction under the city
10 statute. We've already argued that.

11 THE COURT: The next objection, page 29, seems to me
12 we need to make that change. Left out some words there. "That
13 that protected activity" should be "in that protected
14 activity."

15 The next objection. Typographical error. We'll
16 change that as well.

17 Back to what plaintiffs were talking about before with
18 the verdict form. Let me just make sure I have a clear picture
19 of what the plaintiff's objection is here. What is your -- are
20 you conflating the plaintiff's burden of proof in terms of
21 establishing a prima facie case with the defendant's burden of
22 proof in terms of they would have done it solely for
23 non-retaliatory reasons? Is that what's happening here? Tell
24 me what your position is.

25 MR. HUBBARD: Well, your Honor, just as a matter of

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1 preference I don't think we -- I don't think that the prima
2 facie case discussion has any place in the trial of the case.
3 But putting that aside for a minute. I don't think that
4 affects this discussion.

5 If you look at number four.

6 THE COURT: Right.

7 MR. HUBBARD: Number four is the motivating factor
8 question. I would have much preferred it to say was a
9 motivating factor meaning did it play any part in the decision
10 to take the adverse employment action. But the Court has
11 decided to use motivating factor and we understand that.

12 But what I'm saying is that if the jury says yes or no
13 here, there's nothing left for them to decide.

14 THE COURT: Why? If they say no, I can see that. But
15 if they say yes, why are the defendants precluded from proving
16 by a preponderance of the evidence that they would have taken
17 the adverse employment action solely for non-retaliatory
18 reasons?

19 MR. HUBBARD: Because they've already decided that
20 they did not.

21 THE COURT: No. Well why do you say that?

22 MR. HUBBARD: Because they decided that his protected
23 activity was a motivating factor. You can't erase it with
24 five, in our view. What they might have done is really not
25 relevant either.

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1 If they have infected this process with retaliatory
2 animus based upon the protected activity and they answered
3 number four yes, your Honor, I can't imagine they can be
4 exonerated under number five. And that's why we objected to
5 including that section on non-retaliatory reasons in the
6 charge, because it's inconsistent with the entire theme of the
7 city statute.

8 THE COURT: Let me hear from defendants on this.

9 MS. LEVIN: Your Honor, I think the case law on
10 retaliation is clear that even if plaintiff establishes a prima
11 facie case, if the defendant can show that it would have taken
12 the same action even in the absence of protected activity, that
13 the plaintiff doesn't get to benefit from whatever may have
14 happened while he was employed at the company.

15 MR. HUBBARD: There is no law that I have seen at the
16 trial level. They proposed this instruction in their
17 underlying proposal, and we objected to it, your Honor. And I
18 haven't seen any case, certainly from this district, that says
19 what counsel is representing to you. If there is, we can take
20 a look at it. But it would be wrong to -- it would be wrong
21 unless there's some consideration of how the motivating factor
22 comes in.

23 In the Rule 50 motion, citing Brighton, the defendant
24 said the plaintiff must establish that the defendant was
25 motivated at least in part by an impermissible motive. That's

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1 in their Rule 50 motion.

2 MS. LEVIN: That's on a completely different issue,
3 your Honor. We already addressed the fact that motivating
4 factor is the causation standard under prong four of
5 plaintiff's case.

6 The issue is once plaintiff has established a prima
7 facie case there's a clear burden shifting framework.
8 Defendants are entitled to show that they would have taken the
9 same action in the absence of protected activity.

10 MR. HUBBARD: Your Honor, there is no prima facie case
11 at this trial level and that is an improper, improper statement
12 of the law under the city statute.

13 MS. LEVIN: Well I disagree with Mr. Hubbard who is
14 accusing me of misstating the law. I know the law very well.
15 I know what it is. I haven't misstated it.

16 THE COURT: I'll be back. I'm going to go do some
17 research on this. I'll be back.

18 MR. HUBBARD: Thank you, Judge.

19 (Recess)

20 THE COURT: All of our jurors are here now. I've
21 looked at that issue. I do think that it makes sense to delete
22 that from the New York City Human Rights Law claim question
23 five. I do think that is sort of subsumed within question
24 four.

25 To the extent that defendants still feel this is an

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1 issue, I suppose what we could do is after the jury's verdict,
2 assuming there is a verdict at some point, we can give them a
3 special interrogatory and they can answer that question, if you
4 feel that that's some misstatement of the law. But I think
5 it's appropriate to take that out of the New York City Human
6 Rights Law section.

7 And what is plaintiff's position with that similar
8 question under Title VII?

9 MR. HUBBARD: Your Honor, I probably need to think
10 about it but I'm not as concerned about it under Title VII.

11 THE COURT: Okay. Yes.

12 MR. BORTNICK: That would come out.

13 THE COURT: The time is now.

14 MR. BORTNICK: It would come out of the jury charge as
15 well.

16 THE COURT: Under the New York City Human Rights Law,
17 we will take that out of the jury charge as well.

18 MR. BORTNICK: Okay.

19 THE COURT: All right. So if you're going to think
20 about it, you better tell me now, because once we start --

21 MR. HUBBARD: The problem, your Honor, I've tried
22 several of these cases where we didn't differentiate, because
23 you could get an inconsistent answer.

24 So, for example, under the Title VII the jury could
25 return -- answer an interrogatory verdict on adverse actions or

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1 materiality or these other things and then they got to get back
2 to them when they get to the city statute or the state statute
3 so you run some risk. Sometimes we just try to lump them
4 altogether and the but for causation has caused a problem with
5 that. It used to be that you could just do it all in one
6 place. I want to look real quick --

7 THE COURT: Actually as I'm looking at this, it seems
8 that that question -- I don't know if that question is actually
9 in our Title VII verdict form. I don't think it is.

10 MR. BORTNICK: It's not.

11 THE COURT: So that's not an issue. So I think we're
12 good to go. Ready for summations now?

13 MS. LEVIN: Your Honor, I understand the Court's
14 decision. I simply wish to note for the record our continuing
15 objection to the deletion of that question from the verdict
16 form. Thank you.

17 THE COURT: Thank you. It is noted.

18 Is there anything else before we start closing
19 argument?

20 MR. HUBBARD: I just want to put these papers away.
21 May I just have 30 seconds?

22 MR. JACKSON: Your Honor, can we just have one minute?
23 Because of the Court's change, I just want to make a slight
24 change to the PowerPoint that we're using. And I'm just going
25 to run to the bathroom real quick.

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1 THE COURT: I will give counsel a six-minute break.
2 We will make those corrections to the jury instructions and the
3 verdict form. As soon as those changes are made we'll give
4 those to counsel's associate counsel so they can look at that
5 before we do anything like that.

6 MR. JACKSON: Thank you, Judge.

7 THE COURT: Just going to break. Then we'll head into
8 summations. Have counsel been able to edit their summations
9 somewhat in terms of time?

10 MR. HUBBARD: I have been doing -- practiced it twice
11 and have done the best we can, yes.

12 THE COURT: Okay. See you soon.

13 (Recess)
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1 THE COURT: Here is the updated jury charge. Counsel
2 can look at that, see if there's anything else that needs to be
3 dealt with. Then let's go straight into defense counsel's
4 summation and take a 20-minute break and maybe we can discuss
5 other issues with the charge jury charge then.

6 MR. HUBBARD: Take a break between the two arguments?

7 THE COURT: Yes, that's what I just said.

8 MR. HUBBARD: Let me ask, is it possible to get this
9 verdict form emailed to us by your staff?

10 THE COURT: Yes.

11 MR. HUBBARD: Thank you.

12 THE COURT: I plan on telling the jury that -- give
13 them a general instruction that counsels' closing arguments are
14 not evidence, just what counsel believes the evidence has shown
15 in the case, but jurors should still pay close attention to it.

16 Anything else from plaintiff?

17 MR. HUBBARD: No, your Honor.

18 THE COURT: Defense?

19 MR. JACKSON: No, your Honor.

20 THE COURT: Is there any demonstrative evidence that
21 either side wants to use? If so, has it been shown to opposing
22 counsel already?

23 MR. JACKSON: I think all of the demonstratives in
24 our --

25 THE COURT: Are things that have already been --

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Summation - Mr. Jackson

1 I'm sorry, go ahead.

2 MR. JACKSON: I think all the demonstratives in ours
3 are things that have been shown. There shouldn't be anything
4 surprising.

5 THE COURT: Okay.

6 MR. HUBBARD: Your Honor, I don't think I intend to
7 use anything other than exhibits that are in evidence.

8 THE COURT: Okay. Let's bring the jury in.

9 (Jury present)

10 THE COURT: Welcome back. I hope you had a pleasant
11 evening. Sorry for the delay. We'll get starting with closing
12 arguments by counsel, and I instruct you that closing arguments
13 do not constitute evidence, it's simply what the lawyers
14 believe the evidence has shown in this case. You should pay
15 attention. If anything that counsel says is conflict with your
16 recollection of the evidence in this case, it is your
17 recollection that controls.

18 We will start with the closing argument by defense
19 counsel.

20 MR. JACKSON: Thank you, your Honor.

21 Good morning, ladies and gentlemen.

22 Now in his opening statement when Mr. Hubbard started
23 out he made clear what he was going to attempt demonstrate
24 during the course of this case. What Mr. Hubbard said in his
25 opening statement was that the evidence will show that

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Summation - Mr. Jackson

1 Mr. Picarella stood up for young female colleague who was
2 sexually harassed. And he also stated that the evidence will
3 show that the senior management did not like it and they
4 retaliated against him for reporting that conduct.

5 Now at this you point, ladies and gentlemen, you know
6 that that's what Mr. Hubbard said at the start of the case, but
7 you have seen all the evidence and it's clear that that is not
8 what the evidence demonstrated. The evidence hasn't
9 demonstrated anything like that.

10 During several days of trial Mr. Picarella was able to
11 call all of the witnesses that you saw to stand, witnesses from
12 HSBC, former employees of HSBC, anyone could testify. And when
13 these current and former employees came from all over the world
14 and came from all over the country to testify in this case, you
15 didn't hear a single HSBC employee say that they had any intent
16 to retaliate against Mr. Picarella. You didn't hear a single
17 witness say that they had seen anyone exhibit an intent to
18 retaliate against Mr. Picarella, and you didn't see any
19 documents to demonstrating an attempt to retaliate against
20 Mr. Picarella. In short, you saw no evidence whatsoever that
21 supported the theory of the case that Mr. Picarella has
22 attempted to advance during the course of this case.

23 Mr. Picarella didn't get the promotion that he wanted
24 because there was a more qualified woman who had been an
25 excellent worker at her job, and she was selected for it.

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Summation - Mr. Jackson

1 Mr. Picarella was ultimately terminated from his job years
2 after he alleges that he first complained about protected
3 activity because he was doing a bad job. He was being a really
4 poor colleague in terms of the way he was dealing with other
5 people, which was a critical part of his job. That's what the
6 evidence demonstrated, and that's why Mr. Picarella is not
7 entitled to anything under the law and just as a matter of
8 common sense.

9 Now I want to thank you all for your attention during
10 the course of this case. As we said in the opening statement,
11 we know, we know that jury service is a serious imposition on
12 your life. It's difficult. We all know you have other
13 responsibilities; your jobs, your families, your lives. And
14 for all the parties, we deeply, deeply appreciate how attentive
15 you have been throughout the course of the case. It's been
16 evident in how you have been patient in dealing with this case,
17 and we attempted to make it as efficient as possible, and I'm
18 going to attempt to make it as efficient as possible today as I
19 talk through what I believe the evidence has shown in the
20 course of this case.

21 Now one of the things I want to say before I talk
22 about that is that I hope that it is not lost in the back and
23 forth in court how important this is, less so because of
24 anything having to do with the damages, money that you
25 ultimately will hear about, but because of the principles that

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Summation - Mr. Jackson

1 are involved in this case. These are very serious laws. They
2 have to be taken seriously. And it is a big deal in a case
3 like this when, as we said at the beginning, and as I think the
4 evidence has shown, someone like Mr. Picarella attempts to make
5 a mockery of these laws, attempts to manipulate them for his
6 own purposes. It's a big deal. These are important laws, and
7 we ask that you don't lose sight of how important these laws
8 are and how important it is that they're treated seriously.

9 Now I think it is useful right at the outset here to
10 talk about, since we heard now several days of trial, what I
11 would submit to you, based on what you have seen during the
12 course of the case, what is no longer in dispute, no longer in
13 serious dispute, I will submit. And there are several things,
14 a handful of things, that I think we can easily dispose of,
15 because if you look at the evidence, if you consider the
16 testimony that you heard and what you didn't hear, there are
17 several things that there can be no serious dispute about.

18 What are those things? First, there's no serious
19 dispute at this point that numerous HSBC employees complained
20 about Mr. Picarella's work throughout the time that he was
21 working there. You heard from Mr. Picarella's supervisors.
22 You heard from his co-workers, you heard from human resources
23 professionals that were dealing with complaints, and you saw a
24 number of the documents that are related to that. People were
25 complaining about Mr. Picarella's work product, his follow

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Summation - Mr. Jackson

1 through on work, his level -- the way that he dealt with his
2 colleagues, his communication. There were a number of problems
3 that were the subject of discussion from the beginning of the
4 time he was there all the way up to the end. There's no
5 serious dispute about that.

6 There's also no serious dispute that many of the
7 people that you heard from had no motive that could even be
8 articulated by Mr. Picarella to retaliate against him. And
9 these are people who observed serious problems with him. You
10 heard no articulation of why these later supervisors, younger
11 co-workers, would somehow retaliate against Mr. Picarella with
12 no motive whatsoever.

13 You even heard complaints were being made -- and we'll
14 talk about that later, but complaints were being made by the
15 woman that Mr. Picarella claims he was trying to be the white
16 knight for. She was complaining about Mr. Picarella's work.
17 And there can really be no question that that young woman had
18 no motive to retaliate against Mr. Picarella. These were
19 genuine complaints about the fact that he was never at his desk
20 doing what he was supposed to do.

21 Let's take a quick look at very quickly some of the
22 trial testimony. This is what Mr. Picarella said when he was
23 asked the question: You are aware that Ms. Parker complained
24 that you were doing very little work after you found out that
25 you weren't going to get your bonus?

GCETPIC2

Summation - Mr. Jackson

1 He says that he is aware of that.

2 You heard from Chris DeLuca, and we asked him about
3 several specific incidents back in 2012, the beginning of 2012,
4 before Mr. Picarella had even made the complaints that he's
5 made the focus of this case to HR. Ms. Parker was telling him:
6 Every day Mike is in the conference room on long phone calls.

7 Then on December 8, 2011, Ms. Parker was saying to
8 Chris DeLuca: He just doesn't like being told to do things, I
9 guess. You can have conversations until the day you die, but
10 you also need to sit at your desk, grit your teeth, and do some
11 work. And Chris DeLuca told you that. Again, Chris DeLuca had
12 no motive to retaliate. This is before there was ever any
13 complaint made to HR, even by Mr. Picarella's own timeline,
14 which we will talk about more also.

15 There's also no serious dispute that one of the
16 important aspects of the job performance -- and this is true
17 with any job, but witnesses told you it was particularly
18 important in Mr. Picarella's job -- was appropriate
19 communications with your co-workers. You heard that even from
20 Ian Mullen, who is really the one person that --
21 Mr. Picarella's mentor, who testified that he had some positive
22 things to say about him.

23 And he we asked him: One of the things you were
24 describing in your direct testimony was the role for
25 Mr. Picarella was hired. And you would agree with me it would

GCETPIC2

Summation - Mr. Jackson

1 be very difficult to perform that role if one wasn't operating
2 at the appropriate level of collegiality, correct? And the
3 answer from Mr. Mullen was: Yes. Obviously yes.

4 This was an important part of his job, because a lot
5 of his job had to do with coordinating people, being the link
6 between different businesses and different roles people were
7 playing, and every one that you heard from said Mr. Picarella
8 was terrible at that.

9 There's also no serious dispute, as I said a moment
10 ago, that a number of complaints were made about Mr. Picarella,
11 numerous complaints were made before any complaints that could
12 have led to retaliation. There's no dispute that the human
13 resources professionals that were involved in this case handled
14 everything dealing with Mr. Picarella professionally and
15 courteously.

16 And you saw these people, you saw them come in and
17 testify under oath, and they all talked to you about how much
18 they attempted to respond to Mr. Picarella's concerns in a way
19 that was professional and courteous. Ms. Bilbrey, Ms. Weiss,
20 Ms. Malanga, Sue Jang, all the women who worked in human
21 resources came in and talked to you about how important it was
22 to make sure that they were giving him appropriate
23 consideration to deal with him professionally and courteously.

24 And Mr. Picarella even admitted, when he was asked
25 about this: By the way, let's go to the top and close this

GCETPIC2

Summation - Mr. Jackson

1 out. And we asked him: This was a professional response in
2 your mind? Absolutely, he said. It was a courteous response?
3 He said yes. He acknowledged that about a number of HR
4 professionals, they had been courteous in their dealings with
5 him, and this is no real dispute about that.

6 There's also no dispute that by 2014 Mr. Picarella was
7 only spending ten percent of his time in the office working.
8 That's something that Mr. Picarella had to admit to on the
9 witness stand. He's only spending ten percent of his time, by
10 2014, working.

11 And this is, I would submit, ladies and gentlemen, one
12 of the more amazing answers, because we asked him: When you
13 went to work, if you only had enough work to take ten percent
14 of your time, how did you occupy your time? His answer was:
15 It wasn't easy. I would read at my desk, read news articles
16 related to business, talk to colleagues in the building trying
17 to talk about business, and work on personal stuff.

18 Now you have all worked at jobs. You have worked at
19 places, and I submit to you it doesn't match your common sense
20 that in an organization where there is as much that needs to
21 get done as needed to get done at HSBC that Mr. Picarella can
22 only find ten percent of his time with something to do. Does
23 that comport with your experience at any job that you've ever
24 worked, that there was a guy that nobody needed him to do
25 anything? Does that match up with what saw in the documents?

GCETPIC2

Summation - Mr. Jackson

1 No. But we'll talk about that. There's no real dispute about
2 that.

3 There's also no dispute that Pablo Pizzimbono and Suzy
4 White, two of the core people that Mr. Picarella claimed were
5 involved in retaliating against him, there's no dispute,
6 pursuant to Mr. Picarella's own testimony, that these people
7 were both supportive of Mr. Picarella at various points. They
8 were attempting to be supportive of him and reaching out and
9 trying to give him a fresh chance, a fresh shot over and over.
10 Ms. White talked about trying to find new supervisors for him
11 at different points. There's no dispute about that.

12 And finally, there's no serious dispute that HSBC
13 continued to employ Mr. Picarella for years, years after he
14 first made his complaint. And that, ladies and gentlemen, is
15 just inconsistent with any common sense notion of what
16 retaliation looks like. You don't keep a guy for years and pay
17 him hundreds of thousands of dollars if you're trying to
18 retaliate against him for a complaint. It doesn't make any
19 sense. They were trying to give Mr. Picarella a fresh shot.
20 No dispute that Mr. Picarella worked there for years after what
21 he claims was his initial complaint. And this really puts the
22 nail in the coffin, I think, of his retaliation claim.

23 But given all of that, given all of those things are
24 not in dispute, ask yourself: What is the dispute? And I
25 think it's a legitimate question because it's a little bit

GCETPIC2

Summation - Mr. Jackson

1 difficult, but I submit to you, based on the evidence that you
2 heard, based on Mr. Picarella's failure to call any witnesses
3 who were able to provide anything that sounded like a
4 description of any real retaliation, based on all the
5 documentation that you saw in this case, the only question that
6 is in dispute arguably in this case is: Is there any way,
7 applying the law fairly, that you can disregard all of that
8 evidence, all the testimony that you have seen in this case,
9 and arrive at any verdict other than a verdict of no liability
10 in favor of HSBC? I would submit to you, ladies and gentlemen,
11 very humbly, the answer to that question, the simple answer to
12 that question is no, there is no way.

13 All I will talk about with the remainder of my time is
14 why that's the case.

15 Let me talk about briefly discussing the law that
16 would apply in this case. I will not spend a tremendous amount
17 of time on this because the judge will give you very detailed
18 legal instructions that control. This is just my attempt to
19 give you some framework so you can anticipate the law you're
20 going to hear from Judge Carter, and I want you to understand
21 some of the arguments that we're going to make today and the
22 law you are going to be instructed on.

23 Mr. Picarella has the burden in this case. And that's
24 very important. We weren't required to do anything in this
25 case. We made a number of witnesses available to

GCETPIC2

Summation - Mr. Jackson

1 Mr. Picarella. We called our own witnesses. We asked
2 questions of witnesses that Mr. Picarella called. Some of
3 those people we probably would have called ourselves, but we
4 presented a lot of information to you. But we weren't required
5 to do anything. The burden in this case at all times was on
6 Mr. Picarella to prove that there had actually been
7 retaliation. He's utterly failed to meet that burden.

8 There are four elements, essentially, that
9 Mr. Picarella has to prove. Now the judge is going to instruct
10 you a little bit later on the fact of federal law and talk
11 about state law, there is no state law claim at this point, the
12 city law claim, so it's a federal and a city claim. And the
13 first one is that Mr. Picarella engaged in protected activity.

14 Now I'm not going to spend a lot of time on that
15 because you can assume that he engaged in some protected
16 activity at some point and it would still be very easy,
17 focusing on the rest of the case, to conclude that he can't
18 meet his burden. But I submit to you, ladies and gentlemen
19 even on that element, even on the engaged in protected
20 activity, you yourself could have serious questions. Because,
21 as the judge is going to instruct you later on, Mr. Picarella
22 has to establish that he had a good faith belief, basically, a
23 good faith belief that he was engaging in protected activity
24 complaining about sexual harassment. I think if you look at
25 the course of this case, if you look at the timing of it, if

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Summation - Mr. Jackson

1 you look at what he did and why he did it, you could have
2 serious questions about the good faith.

3 Second element is HSBC had knowledge that
4 Mr. Picarella had engaged in protected activity.

5 The third is that Mr. Picarella was subjected to a
6 materially adverse action at the time or after the protected
7 activity took place. That's the federal standard. It's
8 slightly different from the city statute, but it's getting at
9 the same things in terms of facts. Conduct that was reasonably
10 likely to deter a person from engaging in protected activity.

11 Mr. Hubbard may describe it differently because
12 Mr. Picarella had a lot of complaints, but I think the two
13 things that are adverse actions that are really the focus in
14 this case are Mr. Picarella's failure to get the promotion that
15 he wanted and ultimately went to Ms. Jenner, and Mr. Picarella
16 being fired. There's no question that he got fired. There's
17 no question that he didn't get that job.

18 We don't consider the first one to even plausibly be a
19 possible materially adverse action against Mr. Picarella
20 because he wasn't entitled to it. He didn't get a demotion, he
21 kept his salary. But the second one, it certainly can be
22 considered conduct that could deter a person. So you can take
23 that into consideration. You can think about his termination,
24 and ask yourself, and this is the key question, the fourth
25 element: He has to prove, he has to demonstrate, it's his

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Summation - Mr. Jackson

1 burden to demonstrate any materially adverse employment action
2 that Mr. Picarella was subjected to was the but-for cause of
3 Mr. Picarella's protected activity for the Title VII claim. Or
4 he has to demonstrate that, for the city claim, that the
5 but-for cause of the adverse employment action -- for the city
6 claim he has to demonstrate that the adverse employment action
7 was motivated by Mr. Picarella's protected activity.

8 So for one he has to demonstrate that he was fired
9 because of the protected activity, that has to be the cause,
10 and for the other one he has to demonstrate it was motivated.
11 He can't come close on the evidence to either one of those
12 standards. It is not a close question because there's no
13 evidence in the record of anyone being motivated, and we'll
14 talk a little bit more about that.

15 Now I want to talk to you -- just in term of going
16 through the evidence before I talk about some of the arguments
17 that Mr. Picarella is focused on, I think it's useful to talk
18 about what the road was to Mr. Picarella's termination, because
19 the termination is really the key focus of this trial. And I
20 submit to you that it's not really that complex of a question.

21 There are basically ten steps on the road to
22 Mr. Picarella's termination, and you can think of it almost
23 like the yellow brick road, except the three companions that
24 Mr. Picarella brought were greed, opportunism, and, of course,
25 laziness, instead of the cowardly lion, the scarecrow, and the

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Summation - Mr. Jackson

1 tinman.

2 Let's start at the first step. Mr. Picarella
3 discovered within months of coming to HSBC the people were not
4 happy with his performance, and that he was not likely to get
5 the bonus that he wanted. That's the first step in what
6 happened.

7 And if you look at this, this is back in 2011, again
8 this is before he's made any complaints about sexual
9 harassment, and he is already having conflicts with various
10 co-workers. This is some beef that he had with an individual
11 named Kieran that was completely unclear.

12 Then more evidence of conflicts in 2011. This is in
13 June of 2011, he is having this fight with this individual
14 named Brady who is calling him a political animal and engaging
15 in all these conversations with Ms. Hedges about the back
16 biting and everything that is going on here. He's complaining
17 that someone is saying that his group is lazy. He's talking
18 about ring fencing people, whatever that means, a need to keep
19 people in check.

20 This is a level of animosity with one's colleagues
21 that I submit to you you rarely see for someone who has only
22 been at their job for a month or two. He's only a month or two
23 into his job and he's involved in numerous conflicts with
24 people. And Mr. Picarella admitted this whole thing with
25 Patrick Brady: That has nothing to with any retaliation

GCETPIC2

Summation - Mr. Jackson

1 issues, right? He agreed: No, it didn't.

2 What else? This is the situation where Mr. Picarella,
3 in November of 2011, approached somebody who he said turned
4 beet red -- which one of Mr. Picarella's catch phrases when he
5 starts describing these conflicts with people. He said the
6 person turned beet red when he confronted this much more junior
7 guy, who only said -- who only went to Mr. Picarella's boss
8 because Mr. Picarella wouldn't respond to his emails.

9 This guy is trying to get his job done, some younger
10 guy at the company trying to get his job done, and
11 Mr. Picarella wouldn't respond to his emails. You don't see
12 anything in here saying that Mr. Picarella told the guy, "I
13 have responded to your emails," because he hadn't.

14 Of course, we know from the course of the case the guy
15 went to his supervisor and said this guy doesn't respond to
16 emails. Instead of engaging in a professional, reasonable
17 response, Mr. Picarella goes up and threatens this guy at work.
18 I mean that is stunningly unprofessional and uncollegial
19 behavior. He is saying to them he told the guy: Be careful.
20 Be careful. Who does that at work to a younger colleague who
21 is simply asked: Could you remind the guy we need somebody to
22 respond to these emails? That is improper behavior.

23 And Mr. Picarella admitted this. The reason you were
24 telling him he needed to be careful is because he made a
25 complaint to your supervisor that you don't answer his e-mails.

GCETPIC2

Summation - Mr. Jackson

1 It looks that way. Again, I don't really clearly remember the
2 situation.

3 I submit to you, and this is something we'll talk
4 about later, Mr. Picarella doesn't remember the details of
5 things that are problematic to him, but that is neither here
6 nor there.

7 Now we also know that Ms. Parker was complaining
8 during this early time period about the fact that he wasn't
9 around. They referred to him as: Where's Waldo? And
10 Mr. Picarella conceded that, that people were saying in real
11 time at that time: Where's Waldo? That was their reference to
12 Mr. Picarella.

13 Ladies and gentlemen I submit to you that is -- it
14 takes a lot for your co-workers to think that you are so
15 invisible and hard to find in the office that they're referring
16 to you as: Where's Waldo? That's not being absent once,
17 that's not being absent twice, that is we cannot find this guy.
18 And again, these are people who were talking. This is before
19 there's any motive to retaliate, and they're certainly people
20 who have no motive to retaliate because this is the woman who
21 Mr. Picarella was allegedly trying to protect.

22 Now we also know, by the way, that Mr. Picarella spent
23 a lot of time in dark conference rooms. This is something that
24 Mr. DeLuca told you about, that he found very strange. You
25 don't see people in -- you see people in conference rooms all

GCETPIC2

Summation - Mr. Jackson

1 the time, but you don't generally see him in a conference room
2 sitting in the dark on a cell phone. Mr. DeLuca has no skin in
3 this game, and he described behavior that was very strange, and
4 a number of other people also described that.

5 Now this is Mr. Descamps' testimony about these
6 earlier problems that we saw. And this is in early 2012, again
7 before Mr. Picarella has made any of the complaints that he
8 claims he made to HR, Didier Descamps was having a conversation
9 with Mr. Pizzimbono, and a number of people told you about
10 this, told you that they remembered this contemporaneous
11 conversation where Pablo Pizzimbono and Didier were speaking
12 about the fact that Pablo spoke to me about the fact that the
13 first months of performance were not at the level he was
14 expecting.

15 I submit to you ladies and gentlemen, it wasn't
16 because he didn't have the abilities, it was because he was
17 lazy. It was because he didn't want to do his job and wanted
18 to treat his colleagues poorly. He spent his time threatening
19 some junior guy telling him to be careful when he should have
20 been focused on doing his job. Again, these are some of the
21 other things we can talk about, Weiss talked about it.

22 And by the way, it's worth mentioning very briefly,
23 you heard Mr. Ian Mullen. Mr. Hubbard may talk about him
24 later. He said some nice things about him. He said he was
25 Mr. Picarella's mentor. We submit his testimony is really

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Summation - Mr. Jackson

1 meaningless in this case because Ian Mullen didn't really have
2 the opportunity to observe Mr. Picarella during the first few
3 months that he was there.

4 And even during that time what he is saying is that:
5 What portion of the day would you spend with Mr. Picarella
6 during the time period? Maybe one percent, two percent.
7 That's the only witness that Mr. Picarella called in this case
8 who is able to say anything positive about Mr. Picarella's work
9 experience, and this guy had no real exposure to Mr. Picarella.
10 99 percent of the time he was dealing with other people. He
11 was trying to be nice, but his testimony is really not
12 meaningful.

13 What's the second step on the road to Mr. Picarella's
14 termination? It was after he learned he wasn't getting the
15 bonus he wanted his already poor work started deteriorating
16 even further. And we saw during the course of this case that
17 Mr. Picarella knew that. So he started looking for another
18 job, again before any of the alleged retaliation issues started
19 to develop.

20 This is during -- we asked him about this, yes or no,
21 your conversations with Mr. Freer -- that's the recruiter that
22 he was speaking to relatively early during his time there --
23 had nothing to do with retaliation? He agreed with that.
24 Mr. Picarella said: Yeah, I wasn't retaliated against at that
25 time.

GCETPIC2

Summation - Mr. Jackson

1 I asked: Were you looking for a new job at that time?

2 He said: No, but I was beginning to have some doubts
3 as to whether HSBC was the right place for me.

4 He's looking for a new job. Why? Just based on what
5 I saw, a toxic relationship, the bonus was not what was
6 promised.

7 Again, multiple witnesses told you he was never
8 promised any huge bonus. He got a nice bonus anyway. Most
9 people would consider a \$50,000 bonus on top of making a couple
10 hundred thousands dollars or \$250,000, whatever he made, is a
11 nice bonus, but he was upset that it wasn't bigger.

12 And at that point, because of that, he considered it
13 to be a toxic environment. He was looking for a new job,
14 ladies and gentlemen, because he had already heard from
15 supervisors that they were really dissatisfied with his work,
16 and that's where things started to get even worse in terms of
17 Mr. Picarella's job performance.

18 Now the third step, I submit to you, in the road to
19 Mr. Picarella's termination was Mr. Picarella started to put
20 together his secret plan to take over the unit. And this I
21 think ties into the opportunism that you saw repeated with
22 Mr. Picarella throughout the case. This is a guy who is always
23 focused on trying to take advantage of whatever opportunity can
24 arise and turn it to his own benefit.

25 He's communicating -- for whatever reason he doesn't

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Summation - Mr. Jackson

1 like the situation that's unfolding with his co-workers. He's
2 communicating with someone, Marie-Jo Rogers, the woman who was
3 his friend to begin with, who he later ended up concluding was
4 someone he suspected, on no evidence, was attempting to
5 retaliate against him, but this was his friend at this point.
6 And he's communicating to her: I do have an objective for next
7 year that I'm keeping to myself.

8 Then after that he has a conversation with Mr. O'Leary
9 where Mr. O'Leary says, "So the group is all yours now," when
10 Ms. Hedges is out because of a medical procedure that she had
11 to have, and his response is one word: Soon.

12 That's what he said. We heard no explanation of what
13 he was talking about during his testimony about this, but it's
14 pretty obvious what he's talking about. The secret plan is
15 that he's going to do whatever he needs to do to try to push
16 Ms. Hedges out of the picture and assume control of that group.

17 What's the fourth step of this? Mr. Picarella began
18 speaking with human resources about all these problems with
19 Ms. Hedges in April of 2016. Now this is a really important
20 part of sort of the timeline of this case, and what I would
21 submit to you is Mr. Picarella's attempt to smudge and make
22 fuzzy and unclear in this case what he was complaining about
23 when.

24 In April of 2016 he starts talking to human resources,
25 and everyone freely admitted yes, he talked to us then. The

GCETPIC2

Summation - Mr. Jackson

1 complaints that he's making in April of 2016 had nothing to do
2 with any alleged sexual harassment of Ms. Parker. They were
3 taken extremely seriously by HSBC, because HSBC, you heard, has
4 a policy against any type of harassment or bullying, and if
5 it's directed at Mr. Picarella, it's important to HSBC if a
6 supervisor is not acting properly. So it was taken seriously.
7 But it had nothing to do at that point with any alleged
8 harassment of Ms. Parker, which is what this case is about, and
9 Ellen Weiss told you that.

10 When he described this to you, did he describe this in
11 the context of something that he thought was directed to
12 Ms. Parker or more generally? And she said: Definitely not at
13 Ms. Parker. It wasn't explained that way. It was Ms. Parker
14 was there, but it was -- when we were talking about it, it was
15 about Mike. Ellen Weiss was talking about the fact that
16 Mr. Picarella was complaining about his treatment of him.

17 And Mary Bilbrey told you the same thing. At that
18 point -- it was not at that point that it was really raised
19 that there was an issue of harassment, more that there was
20 inappropriate behavior. He was complaining about what he was
21 observing in terms of Eileen Hedges and her treatment of him.
22 And also he just didn't like the friendship, whatever it was
23 that he saw between Ms. Hedges and Ms. Parker, because he felt
24 that he was being subjected to it. That was not a complaint
25 about sexual harassment.

GCETPIC2

Summation - Mr. Jackson

1 This is Ellen Weiss. You remember she took
2 contemporaneous notes of this that matched up perfectly with
3 what her testimony was, and she is saying -- we asked her:
4 What was your understanding of what he was saying about the
5 giggling and winking? That's a reference to one of the notes
6 that she took to memorialize what Mr. Picarella was telling
7 her. Mike said at the beginning that he actually said that he
8 felt at some point they should be separated because they were
9 giggling and would go out together and joke amongst one
10 another, and he felt uncomfortable being part of that. This is
11 a guy that had two women he was working with and he didn't like
12 that they were giggling too much.

13 Mr. Picarella worked on a sales floor where there are
14 like hundreds of people, and he individually on the desk -- you
15 saw a picture of that -- he individually throughout his time
16 there had all these grievances about he felt that everyone on
17 the sales floor should be bowing down to his notion of what
18 would make Mike Picarella happy. And you heard later on, and
19 we'll talk about this, he was complaining that someone was
20 humming; actually went to human resources with a complaint that
21 someone was humming in the room. This is a guy who -- this is
22 not what he represented it to be.

23 One of the ways that you know this is not what he
24 represented it to be is because during this time period he's
25 actually complaining about Ms. Parker and he is disparaging

GCETPIC2

Summation - Mr. Jackson

1 Ms. Parker. He acknowledged that on the witness stand. We
2 asked him: Sir, I want to ask you very simply -- he wanted to
3 wrestle with this, you saw on the witness stand. He didn't
4 want to answer the question because Mr. Picarella knows it's
5 inconsistent with his story.

6 But when we were asking him -- can you go back to the
7 previous slide? When he said very simply, yes or no, during
8 this time period you were having a number of conversations with
9 Ms. Hedges where you were disparaging Ms. Parker, correct? And
10 his answer was yes.

11 I mean he's actually disparaging the woman that he
12 claims during this very same time period he was so concerned
13 about what was happening to her. If you were so concerned
14 about what was happening to your colleague, about what a boss
15 was doing to your colleague, would you be talking to that very
16 same boss and trashing them repeatedly in communications? No.
17 That doesn't make sense. That doesn't comport with any common
18 sense notion of the way people behave who are concerned about
19 other people.

20 And we talked about it here: At this point, you
21 didn't view her as a victim, right? And he said: Right, I
22 wasn't sure. Right, exactly.

23 We'll talk about that more, but it's inconsistent with
24 what he later puts into his EEOC complaint.

25 And this is more of him disparaging her. This is in

GCETPIC2

Summation - Mr. Jackson

1 August, he's talking about she's very sneaky. And this is
2 months after his EEOC complaint that he claims he started to
3 become so disturbed about what he observing with Eileen Hedges
4 he's accusing this woman of being sneaky and painting herself
5 as a victim. This is one of a number of ways in which he is
6 disparaging Ms. Parker.

7 Now the fifth step on the road to Mr. Picarella's
8 termination is that at some point much later, in 2012 --
9 actually, let me back up just a second. At some point later in
10 2012 Mr. Picarella finally makes a complaint to human resources
11 that relates to Michelle Parker.

12 Now again, this comes back to opportunism, and we'll
13 talk a little more about this. But one of the important points
14 that you can't miss from the testimony is that Mr. Picarella
15 makes this complaint after Michelle Parker no longer works at
16 the bank. She's no longer working at the bank. And that's
17 when he decides to go and make the complaint about her being
18 sexually harassed.

19 I just ask you, ladies and gentlemen, to ask yourself
20 if that comports with your notion of the way someone in good
21 faith was trying to look out for someone else behaves.

22 (Continued on next page)
23
24
25

GCE9PIC3

Summation - Mr. Jackson

1 MR. JACKSON: (Continuing) This is also after human
2 resources already knows about what happened to Ms. Parker
3 because she told them. It's pure opportunism.

4 The sixth step on the road is that HSBC appropriately
5 removes Ms. Hedges from her supervisory role and later
6 terminates her, as you heard, and promotes Carol Jenner to
7 Ms. Hedges' former job based on merit, purely based on
8 Ms. Jenner's merit. Very hard working woman.

9 Now, why is this important? Because Hedges being
10 terminated, first of all being demoted, removed from her
11 supervisory role after complaints are made by Mr. Picarella and
12 a number of other people, being removed from her supervisory
13 role and later being terminated, it's completely inconsistent
14 with the idea that the bank wanted to retaliate against him.

15 They got rid of the woman that he's complaining about
16 and they kept him. She lost her job. He continued to make
17 hundreds of thousands of dollars for years. That's not
18 retaliation. That's not something that you see when someone is
19 trying to retaliate against someone. It doesn't match up.

20 And just for a moment I want to talk about the Carol
21 Jenner situation. Because I submit to you, ladies and
22 gentlemen, one of the more offensive ideas to any logic in this
23 case is the idea that Mr. Picarella was retaliated against
24 because he didn't get Carol Jenner's job. I mean that is
25 offensive to logic. Because you all heard from everyone who

GCE9PIC3

Summation - Mr. Jackson

1 testified this was an extraordinarily hard-working woman who
2 got the job based on merit.

3 Look at what is going on here. Mr. Picarella claimed,
4 his only basis for saying that this is retaliation is that he
5 thinks he had more operational risk experience than Ms. Jenner.
6 However, you saw, first of all, during the course of this case
7 that's down at the bottom, that in the peer reviews, people
8 were criticizing Mr. Picarella's operational work experience.

9 You also know that Mr. Picarella had no real
10 understanding of what Ms. Jenner's background was. He admitted
11 to you on the witness stand that that was just based on pure
12 speculation. He hadn't seen her resume, he didn't know her
13 background in the industry. So he's just speculating based on
14 nothing that she only had two or three years of operational
15 risk experience.

16 But what the actual witnesses told you, this is from
17 Mr. Descamps, was that she had previously delivered also with
18 very strong performance -- a very strong performance in a
19 previous role where she was previously working in the
20 operational risk department, where she had a lot of experience
21 and brought that experience to our team. And then he explained
22 why that's important. Managing our risk is key to our
23 business. You know that, just as people who have money in a
24 bank, banks are dealing with the money of customers and it's
25 important to manage risk in terms of that. And this is

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Summation - Mr. Jackson

1 something that they believe was absolutely key and that she was
2 better at.

3 So look in here. The performance reviews. If you
4 look at the 2011 mid year performance review. And this is
5 Mr. Picarella is already performing badly, but before he really
6 started to perform super badly after he didn't get the bonus
7 that he wanted, his rating is a three, which we've heard a
8 number of times had an automatic strong behind it. But they're
9 already talking about criticisms associated with Mr. Picarella.

10 Ms. Jenner has a higher rating. She's a two. And I
11 submit to you, ladies and gentlemen, based on -- look at what
12 was said about Ms. Jenner in these performance reviews. These
13 aren't after-created documents. These are documents that were
14 created years before this case when no one knew that
15 Mr. Picarella was going to make complaints about retaliation.
16 "Carol continues to do a great job and grow in this position.
17 Carol continues to be hard-working, reliable and willing to do
18 what's necessary to ensure projects are completed on time and
19 accurately."

20 That's like the opposite of what everyone testified
21 was their experience with Mr. Picarella. That's not to --
22 look, we're not trying to dump on Mr. Picarella. But what he
23 is presenting in this case is not a fair recitation of the
24 truth. It's not what actually happened. Okay

25 This is a woman who was more qualified for the job

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Summation - Mr. Jackson

1 than him. And the fact that he's upset about that is not
2 retaliation.

3 Let's look at the next one. This is another one.
4 People are already talking again in his early reviews. He
5 needs to be better at communicating. Again, outstanding
6 reviews.

7 By the way, again, we talked about this a little
8 bit -- actually we'll just move on. Let's go to the next slide

9 Now I want to talk about this a little bit because
10 this brings us to the seventh step really of the road to
11 Mr. Picarella's termination. His terrible work continues
12 through 2012 and 2013. And you saw a number of different
13 aspects of the evidence that demonstrate this.

14 This is the list of names that Mr. Picarella
15 submitted. He wrote: Here are a few names that I have worked
16 closely with across different business units in 2012.

17 And again Mr. Picarella in his testimony tried to back
18 off of even this e-mail where he clearly is the one that
19 selected these people and he tried to say: Well, you know,
20 some of those people were suggested to me.

21 No. He picked these people out to be his reviewers.

22 And Ms. White, who also is a person you heard, had no
23 motivation whatsoever to be retaliating against Mr. Picarella,
24 she's just a person who worked at HSBC, was trying to do her
25 job. She contacted the people for the standard 360 reviews

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Summation - Mr. Jackson

1 where your peers get an opportunity to comment on your work.

2 And what did we see?

3 I'm not going to go through them all because, frankly,
4 you heard about them from a number of witnesses. But this is
5 one of his peers, Mr. Pietroforte, saying on more than one
6 occasion the root cause of the issue was not corrected and the
7 same issue came up more than once. As business manager, I
8 would expect him to understand, manage, and improve the
9 process.

10 Let's go to the next one. This is Mr. Blizzard. I
11 believe these meetings could be more productive and efficient
12 if he was more familiar with the rules, materials, and/or
13 relevant procedures in advance of these meetings.

14 Let's go to the next one. Mike's participation in
15 this effort has had fits and starts. There's a lack of
16 understanding the details needed to effectively challenge
17 logistics function. I find the help is limited in scope to
18 e-mail chasers and organizing meetings. That's Cary Goodwin.

19 In my dealings with Mike Picarella I found him to be
20 unreliable. He's lacked follow through on the projects we've
21 worked together on. I don't find him to be the go-to
22 professional we need in that role.

23 Now, again, this is -- these are his -- these are
24 other people in the job who really have nothing to do with any
25 of Mr. Picarella's allegations in any real way other than he

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Summation - Mr. Jackson

1 claims that basically everyone who ever said anything bad about
2 him is somehow engaging in an attempt to retaliate against him.
3 And they are just giving honest critiques.

4 Now, ladies and gentlemen, I submit to you that if
5 you're working in your job you know how difficult it is to
6 write a critical review of one of your colleagues. Nobody
7 wants to do it. Nobody wants to write a review saying that the
8 person that they work with is not up to the job. Okay. It
9 takes a lot for somebody to do that. And the people are doing
10 it because Mr. Picarella is so bad at his job that they can't
11 in good faith respond to Suzy White's e-mail without giving
12 these very serious criticisms of the way that he's performing
13 at work.

14 This was the mid year review summary. And
15 Mr. Picarella during his rebuttal testimony, which we'll talk
16 about briefly later, he made the amazing statement that no one
17 said to him during the time, you know, offered him criticisms.
18 Well this is back in 2012. You know, there's a general feeling
19 that while you're keen to help you are not always reliable to
20 follow through an issue to resolution. You need to work on
21 developing the skills required to resolve the problems. Also
22 felt that you lacked a detailed knowledge of the global markets
23 business

24 Now that's the whole job. I mean having knowledge of
25 the business, follow through, resolving the problems. And it's

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Summation - Mr. Jackson

1 one of the nice things that people try to say about
2 Mr. Picarella in some of these reviews throughout the time he's
3 there, they say he's good at raising issues but he never solves
4 them. You know from your own common sense that's probably the
5 least helpful person in the world, the guy who like when you're
6 riding a car is like I think we got a flat. You can hear it.
7 Everyone hears it like this. Then it comes time to change the
8 flat and he's like good luck with that. We all know we got a
9 flat. Somebody's got to get the jack out. Let's help. Let's
10 help with the problem.

11 Now, just another thing that I think is important to
12 keep in mind as you look at the time period that Mr. Picarella
13 is doing this bad work is that Mr. Picarella was repeatedly
14 refusing to do work. I submit to you that that's exceptional.
15 I submit to you that in your experience you would probably
16 rarely, if ever, encounter a situation where supervisors are
17 repeatedly asking someone to do a job and he's refusing to do
18 it. And we saw that repeatedly from Mr. Picarella.

19 This is where we were asking him about the fact that
20 on certain occasions some of his colleagues complained to him
21 about his failure to attend certain meetings. And I think we
22 all remember the calendar he showed us where he supposedly went
23 to all these meetings. Those are just Outlook entries,
24 completely meaningless

25 What he says is he recalls this e-mail where this guy

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Summation - Mr. Jackson

1 named Mike Susoev, another person who has nothing to do with
2 anything with alleged retaliation, said you physically haven't
3 attended the meeting in three-plus months. When you did, you
4 showed up late and sat there clicking away on your BlackBerry.
5 Not exactly the definition of a fully engaged participant.

6 And that's in July of 2012. This is way back. This
7 is literally years before he ultimately gets fired. People are
8 complaining that he hasn't shown up to meetings in months and
9 that when he comes he's not even paying attention. He's doing
10 something crazy.

11 Now, ladies and gentlemen, I would just submit to you
12 that, again, it takes a lot for in a typical corporate setting
13 someone to one take note of the fact that a guy is not
14 attending meetings. You've got to miss a lot of meetings
15 before people are, like: That dude is never at the meeting.
16 And the one time that he was there, he's just clicking away on
17 his BlackBerry. This is a colleague who has nothing to do with
18 what Mr. Picarella is alleging was in retaliation in this case,
19 who is coming to him and saying: Please, you've got to come to
20 the meetings.

21 It's just laziness and there's really no other word
22 for it.

23 Can we go to the next slide. This is a 2012 e-mail
24 from Ms. Jenner who is the new supervisor; again, who was given
25 to Mr. Picarella, had no involvement with his earlier issues

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Summation - Mr. Jackson

1 with Ms. Hedges. And she's asking him to do stuff. She's
2 pointing out how busy she is on stuff. And his response to one
3 of the things is: I'm bogged down with a number of other tasks
4 can we pass this off to somebody else

5 And then on another occasion he's communicating to
6 Suzy White and Carol Jenner, his boss and his boss's boss: I'm
7 covering sales functions that other people would cover in
8 addition to my normal job functions and DF suitability. I have
9 zero capacity. Actually in deficit

10 Now, ladies and gentlemen, when have you -- one of the
11 sort of amazing things in terms of the timeline that
12 Mr. Picarella has set out in this case is that he apparently
13 went from a situation where even though no one else who
14 testified in this case could understand how he could possibly
15 be too busy, because he's not showing up to meetings, everybody
16 is saying he doesn't get anything done. But somehow during
17 that whole time period in 2013; 2012, 2013, he's too busy to do
18 anything that people are asking him to do. And then at a
19 point that he can't identify he goes all the way to the other
20 extreme where he has nothing to do but surf the web. That
21 doesn't make any sense, ladies and gentlemen. We actually
22 asked him: Can you tell us at what point this transition
23 happened? He's like, hard to say.

24 Ladies and gentlemen, that doesn't comport with your
25 common sense. People were asked -- and it definitely doesn't

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Summation - Mr. Jackson

1 comport with the evidence. People were asking Mr. Picarella
2 the entire time he was there to do jobs. He was refusing to do
3 them.

4 And that brings us to the eighth step on the road to
5 Mr. Picarella's termination which is that by 2014 he is
6 literally doing nothing at work.

7 By the way, actually go back. This is just important
8 because one of the other things that people were complaining
9 about is that he was -- his communications were improper, they
10 talked about the fact that he was abrasive and sometimes
11 offensive and how that gets in the way of getting results
12 delivered. And that's not something that people say everyday
13 about their coworkers in a normal environment, certainly not
14 executives who are supposed to be mature people at work, who
15 are supposed to be senior vice-presidents; that they're
16 operating the way that people are finding abrasive and
17 offensive. Those are extraordinary criticisms.

18 Now, again, by 2014, by Mr. Picarella, he's forced to
19 admit this, because the reason he's forced to admit this is
20 because there is no work that he can show for his entire time
21 during this time period, there's almost nothing he can show for
22 this time period. He points to a couple of random things but
23 he's got this whole claim that his responsibilities were taken
24 from him

25 But he makes the statement. It wasn't easy, it wasn't

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Summation - Mr. Jackson

1 easy. And, ladies and gentlemen, that is a ridiculous
2 statement. He's talking about working on personal stuff
3 sitting at his desk while he's collecting a huge salary from
4 HSBC and claiming that it wasn't easy. Okay. It wasn't easy
5 is digging a ditch all day. Not sitting in a dark conference
6 room surfing the internet while your colleagues are begging you
7 to do your job and you're spending 90 percent of the your time
8 surfing the web. It wasn't easy.

9 By the way, his own estimation matched up perfectly
10 with Mr. Karam's testimony. You saw Mr. Karam said that: In
11 2014 how much of his workday did he spend at work?

12 It was hard to guesstimate but a minimum

13 More or less ten percent?

14 Could have been either side of ten percent. Could
15 have been nine, could have been eleven.

16 Would you have preferred that he was a productive
17 engaged member of your team?

18 Absolutely. And he explained: Our responsibilities
19 and our role are significant. We're supporting 150 sales
20 people. So our plates in the role are full, and there's plenty
21 of work to do, plenty of exposure to be had. It just requires
22 people to have innative and wanting to progress their careers,
23 to be able to develop some skill sets, to look further into the
24 future for more responsibility. And he never expressed any
25 willingness to expand that.

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Summation - Mr. Jackson

1 And, ladies and gentlemen, this is the person that
2 Ms. White explained to you she assigned to Mr. Picarella
3 because he had so much difficulty with all of the other
4 supervisors. And he was a person that she understood to be a
5 very patient, gentle person who she thought might have a chance
6 to be able to work with him and actually get something out of
7 him. And even Mr. Picarella, you know, he told you during
8 his -- Mr. Karam told you during his testimony that he started
9 out having collegial communications with him where he was like
10 we had some things in common, same kind of church stuff, and
11 then he would just turn around and just slam me after
12 conversations.

13 And by the way, there is a point where Mr. Picarella
14 is claiming that Mr. Karam threatened him. And I just think
15 that this is really important that you understand that this is
16 false, okay. Mr. Karam testified that this didn't happen.
17 Mr. Picarella admitted that he never saw Mr. Karam behave in
18 that way towards anyone, anyone throughout the years that he
19 was working there. And he admitted that this happened in a
20 glass room on a trading floor that literally hundreds of other
21 people sat on.

22 We asked him: And no one that you're aware of saw
23 anything like what you're describing, right?

24 Right.

25 Just you?

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Summation - Mr. Jackson

1 Just me.

2 Ladies and gentlemen, do you have any idea how boring
3 it is in the middle of the workday for a lot of people who are
4 sitting on a big trading floor, do you really think that
5 hundreds of people would miss if there was a showdown happening
6 in the glass conference room right there? Nobody would see it?
7 Nobody saw it but Mr. Picarella? It doesn't make any sense.

8 The reason it doesn't make any sense is because it
9 never happened. Mr. Karam didn't threaten him. He didn't turn
10 beet red like the guy that Mr. Picarella threatened who we know
11 that he actually threatened someone because he admitted it in
12 his communications. It didn't happen. It's another attempt to
13 smear a person who had nothing to do with any alleged
14 retaliation

15 And you know Mr. Karam, you saw him when he came in
16 and testified. This is difficult to come into a courtroom
17 where the guy has accused you of some very serious stuff. And
18 you saw when he was testifying how uncomfortable it was for him
19 to talk about the fact that like he was being accused of
20 threatening a coworker. And this ended up all over the place,
21 in the paper. And it is so contrary to what all of the other
22 witnesses testified about what Mr. Karam was and what even
23 Mr. Picarella testified he knew about Mr. Karam's persona and
24 the way that he generally dealt with his colleagues.

25 So what's the ninth step? Mr. Picarella -- this is a

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Summation - Mr. Jackson

1 step that we don't need to spend much time on because it's not
2 really significant. But the ninth step is that Mr. Picarella
3 is investigated completely legitimately for a leak after he's
4 already given information to the very same reporter. His
5 attorney has been in contact with that reporter.

6 Look, this is important because for whatever reason
7 Mr. Picarella has made this red herring of like the leak
8 investigation that happened near the end of the time that he
9 was there. That has nothing to do with anything. The
10 information that was leaked during the course of that meeting
11 had nothing to do with retaliation, had nothing to do with
12 sexual harassment. It was basically related to HSBC's
13 customers and it was taken very seriously because banks have a
14 responsibility to protect the information and to protect the
15 sensitive information of the people that they work with. We
16 all hope for that from our banks that if they find out that an
17 employee might be disclosing information about customers that
18 they'll take it very seriously. So it was taken very
19 seriously.

20 And one of the people who was at that, who was
21 investigated, for reasons I would submit to you makes sense,
22 was Mr. Picarella. But everyone said they couldn't determine
23 conclusively, even though they thought based on the factors,
24 like the fact that he was in communication previously with the
25 very same reporter, they suspected him of being the person that

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Summation - Mr. Jackson

1 was the source of the leak. But they said that's not -- we
2 can't determine conclusively. And so that's not going to be
3 factored into why ultimately he was terminated.

4 And that brings us really to the last step on the road
5 to Mr. Picarella's termination which is he was terminated in
6 2015 after years of, frankly, just underperforming, after years
7 of not doing his job.

8 Everyone who testified in this case, everyone who
9 testified in this case said that the reason that he was
10 terminated was because of his lack of performance. Okay. He
11 hasn't brought in a single witness. He wasn't able to bring in
12 a single document to evidence that there was another reason for
13 that. And there is no other reason.

14 Just very quickly. You remember Mr. Descamps's
15 testimony, you know, what we discussed, we reviewed the last
16 four years of performance review of Mr. Picarella, that was the
17 essential basis by which we decided it was time to terminate
18 his employment.

19 Then you saw the testimony of Ms. Bilbrey. Again,
20 this is a person who doesn't even work at HSBC anymore. She
21 works at a different job in Chicago for a real estate company.
22 She's got no skin in this game. It was like do you know why he
23 was terminated. Because of his performance.

24 You heard from Mr. Karam. You know, his performance
25 had degraded. I had no choice but to recommend termination.

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Summation - Mr. Jackson

1 It was at the point where I feel like we weren't connecting
2 where I could help him come along, rehabilitate his career.

3 Sue Jang. Talked about the fact that even early on
4 Ms. Hedges was making -- raising concerns about Mr. Picarella's
5 performance. This is going back years, going back before he
6 ever raised any issues.

7 Sue Jang also told you about how Mr. Pizzimbono raised
8 these concerns very early on during the time that Mr. Picarella
9 was there. And he was given years of second and third and
10 fourth and fifth chances.

11 Mr. Silber described his work. Again, another person
12 who had had no involvement in anything having to do with any
13 alleged sexual harassment retaliation. He was describing his
14 work. He was saying: I would just call it sloppy, incomplete,
15 not the type of work product I would deliver to my boss and
16 certainly not to my boss's boss. Unimpressive

17 These are the people that Mr. Picarella chose to call.

18 Mr. Picarella wasn't there. We asked Mr. Karam: Was
19 he usually in his office when you would expect him to be? Not
20 typically, no.

21 Were there times when Mr. Picarella was out of the
22 office and had failed to notify you in advance? Yes.

23 He said that that happened repeatedly.

24 Did you receive complaints from others at HSBC about
25 Mr. Picarella's responsiveness? Yes.

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Summation - Mr. Jackson

1 And he said that Mr. Picarella did not respond to
2 e-mails in a timely fashion.

3 This is really -- there can't be any dispute about the
4 fact the guy just did not respond to e-mails. You saw going
5 back to the threat that he had against the junior guy. That
6 was the complaint that led to him threatening that guy to be
7 careful way back at the beginning because the guy was like this
8 guy never responds to e-mails.

9 Did you ever observe Mr. Picarella in a darkened
10 conference room speaking on his cellphone?

11 Often.

12 And he said that it was a difficult situation, but
13 he'd often find him away, nonresponsive in a closed conference
14 room speaking on his personal phone.

15 Talked about his attitude.

16 Can go on.

17 And Suzy White. This is another important one. Back
18 in March 14, 2012 she was communicating with Ms. Hedges that
19 based upon the communications it was clear that he had -- that
20 he could not do risk type things. She explained to you this is
21 really an essential part of the job. But she is communicating
22 in real time before he's made any of his complaints to HR. We
23 just can't ask him to do risk type things. We're going to have
24 to try to find something else for him to do, even though that's
25 the core of his job.

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Summation - Mr. Jackson

1 Mr. Karam continued to talk about how he failed to
2 take a leadership role. How he had to be spoonfed in terms of
3 getting him through the actual objective.

4 Now, there are -- just to point out. I think that
5 there is -- it is important to focus for one second on this
6 three-strong thing because it's been the subject of a lot of
7 testimony. I think it's obvious to all of you at this point
8 the three rating is meaningless. Okay. HSBC discontinued it,
9 you heard, because they even realized we've got a rating system
10 that's broken. Okay. It's meaningless. It amounted to
11 70 percent of the people at the bank got a three rating.

12 So you had people like Ms. Jenner who were in the top
13 20 percent of the employees who got a two or a one. And then
14 everyone down from like the person who was in the, like the
15 80th percentile, all the way down to the bottom ten percent of
16 employees -- I'm sorry -- were getting like this three rating.
17 And you had to be basically -- you could be almost at the
18 border of the bottom ten percent and still get the three
19 rating.

20 It doesn't mean anything. You have to look at the
21 words in the review. You have to look at what absolutely was
22 there. And that is what explains, when you look at the actual
23 documentary evidence, what was actually going on with
24 Mr. Picarella and what the witnesses testified; how poor his
25 performance was and why he had to be terminated

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Summation - Mr. Jackson

1 And this is something that Sue Jang explained. She
2 told you the majority of the people are three strong.

3 Mr. Descamps explained that. More or less given to
4 70 percent of the population.

5 Now, just to be clear. This is important because
6 Mr. Picarella hasn't even alleged when he was putting together
7 on the stand his list of people he thought had retaliated
8 against him, he didn't even include Mr. Descamps. And
9 Mr. Descamps, who came here from France, the French gentleman
10 that you met, he was the ultimate decision maker. And he said
11 he did it purely on review of the performance report. And he
12 said that he had not heard anyone talk about retaliating
13 against Mr. Picarella.

14 So the ultimate decision maker had no exposure to
15 retaliatory intent and he himself was doing it purely on bad
16 performance. That's really the end of the question in terms of
17 whether or not this was anything that played a role.

18 Could we just go to slide 116. Actually go to 114.

19 Just to be clear. Every witness that testified said
20 that they had never seen any indication of retaliation. These
21 people all came in and testified under oath. Unless every
22 single one of them, including people who no longer work at
23 HSBC, people who had no involvement in this, unless every
24 single one of them is lying and came up with part of some
25 massive conspiracy that was created years ago to go back and

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Summation - Mr. Jackson

1 create contemporaneous documents that matched up perfectly with
2 their testimony, unless they are all doing that, he can't meet
3 his burden. There is no evidence of retaliation.

4 The last thing I'll say is on that, is that he's paid
5 over a million dollars during this time. And almost all of it
6 is after he makes the complaints that are at issue in this
7 case. So, ladies and gentlemen, that's not what retaliation
8 looks like. It just isn't. He was terminated because he was a
9 poor performer. And that's his compensation. It's simple.

10 Take that down, please.

11 Now, there are a couple of special notes that I want
12 to point out about Mr. Picarella's testimony that I think are
13 important for you to take into consideration.

14 One of them is that a lot of the testimony is just
15 illogical. Years after -- we are now years after he first
16 started claiming retaliation and Mr. Picarella still couldn't
17 describe coherently who he thought was engaged in this
18 retaliation effort against him. You saw that during the course
19 of this. We were just asking him a question: Please, can you
20 tell us who was doing the retaliation. And he started adding
21 names. You know he had Ms. Weiss, Ms. Hedges, Ms. White,
22 Mr. Pizzimbono, Mr. Karam, Maria Malanga, Cary Goodwin,
23 Mr. Pietroforte, Mary-Jo, Margaret, Carol Jenner and Bo
24 Prempeh. All these people were supposedly engaged in
25 retaliation against him just because they said something that

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Summation - Mr. Jackson

1 was critical about him during the course of time that he was
2 there. No actual evidence. He's just slamming everybody who
3 said anything that was critical about him, and even some people
4 who didn't really even have much involvement than that.

5 What else? Mr. Picarella simply did not tell the
6 truth with regard to his timeline about when certain things
7 happened. Okay. And this is something that is made explicitly
8 clear by the testimony. When you compare his testimony to his
9 EEOC complaint, when you compare it with the documents in this
10 case, it's clear that Mr. Picarella offered false testimony
11 about this on the stand.

12 Now if you look at this, this is from the note of his
13 complaint to HR in October of 2012. And in this version of
14 what Mr. Picarella told HR that he learned about the Key Largo
15 situation in August of 2012 after Ms. Parker contacted him
16 related to a job referral. That's what he told HR in
17 October 2012.

18 Let's go on.

19 Then in his EEOC complaint he says that in June of
20 2013 -- and this is important because he acknowledges that
21 Ms. Parker left on June 1, which is a fact. She left HSBC for
22 new employment on June 1. He says shortly thereafter he was
23 questioned about this. And he says on or about June 28 he
24 reported to Weiss and Pizzimbono that Parker had been sexually
25 harassed at an investment conference in Key Largo after hearing

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Summation - Mr. Jackson

1 conversation about that activity on the desk. So this is the
2 end of June he claims now, and this is different, right.
3 Because in the EEOC complaint he's claiming at the end of June
4 this is what he heard about -- hearing about this activity on
5 the desk. Then we get yet another version. Because he's
6 saying in his trial testimony that in the middle or end of June
7 he overheard Ms. Parker at her desk talking about this.

8 So first he overheard it -- first he learned about it
9 from her telling her when he saw the job -- when she saw the
10 job referral. Then he heard about it from other people,
11 according to his EEOC complaint, after she left the job, you
12 know, people talking about it on the sales desk. Then in his
13 testimony he comes up with yet a third version where he's
14 saying in the middle of June or the end of June -- and, by the
15 way, this was after she no longer works there so it would have
16 been impossible -- he's saying that he overheard her telling
17 stories about what happened in Key Largo; at least three
18 different versions of the story of how he heard this that he's
19 giving in the course of different sworn statements. I mean the
20 EEOC charge is a sworn statement. The reason there are
21 different versions is because Mr. Picarella is making it up as
22 he goes along.

23 The timeline of when he actually made complaints that
24 related to Ms. Parker is completely muddled because he's trying
25 to obscure his earlier complaints which were about him with

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Summation - Mr. Jackson

1 later on when he talked to HR about stuff that happened to
2 Ms. Parker after he realized that it could potentially benefit
3 him and there was an opportunity for him to benefit.

4 Can we go to the next slide.

5 THE COURT: Just one moment counsel. Let me just see
6 counsel in the robing room just briefly.

7 (Continued on next page)

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Summation - Mr. Jackson

1 (In the robing room)

2 THE COURT: Sorry to interrupt your flow. I thought
3 that was a good stopping point. I noticed something in the
4 instructions. Plaintiff's counsel had alluded earlier to my
5 taking out of the instructions the charge about the EEOC
6 complaint. That was simply an oversight. And we had talked
7 about yesterday that's part of that. So I'm going to insert
8 that on page 20 when it talks about his making these claims for
9 retaliation for complaining about the sexual harassment of a
10 female coworker and filing the EEOC complaint. I just didn't
11 want you to be mistaken that that wasn't in the case as you're
12 summing up.

13 MR. JACKSON: That's fine, your Honor. Thank you.
14 Thank you very much, Judge.

15 MR. HUBBARD: Thank you, Judge.

16 THE COURT: Okay.

17 (Continued on next page)

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Summation - Mr. Jackson

1 (In open court)

2 THE COURT: Go ahead, counsel.

3 MR. JACKSON: Thank you very much, your Honor.

4 What else? Mr. Picarella also lied during his
5 testimony about whether Ms. Hedges told him to look for another
6 job. This is in his EEOC charge, as plain as day. His sworn
7 EEOC charge. He says by year end 2011 when I met with
8 Ms. Hedges for my performance review she told me that
9 Pizzimbono and Suzy White, or the COO of global markets, did
10 not think highly of me and it might be a good idea if I looked
11 for another job.

12 Then we asked him about it on the witness stand:
13 Before you even find out about the bonus situation, Ms. Hedges
14 communicated to you that it was the view of some at the bank
15 that you were doing a very bad job and you might need to start
16 looking for another job, right?

17 No. That's not correct.

18 She didn't say anything like that to you?

19 No.

20 She did say you might need to start looking for
21 another job, right?

22 Answer: No.

23 The reason he's saying that is because he's trying to
24 keep organized the web of this timeline in his head because he
25 wants to push back as far as possible the timeline of protected

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Summation - Mr. Jackson

1 activity. But it doesn't make sense.

2 What else? Mr. Picarella also did not tell the truth
3 initially in his testimony about talking on his phone in dark
4 conference rooms. We asked him: There did come a point where
5 you would spend a substantial part of your day sitting in
6 conference rooms with the lights off, right?

7 No.

8 That never occurred?

9 No.

10 At no point?

11 No.

12 Then what happened? Numerous witnesses came in and
13 testified: Yes, of course, this is what he did. Everyone saw
14 it and was like this is strange, strange behavior.

15 Mr. Pizzimbono. He was often seen by myself and
16 others in conference rooms by himself with the lights off
17 talking on his phone.

18 Ms. Malanga said that she was getting reports
19 contemporaneously at the time he was often in dark conference
20 rooms speaking on his phone.

21 Mr. DeLuca was saying way back, going back: Often
22 observe him in darkened conference rooms speaking on his
23 cellphone.

24 Mr. Karam said it.

25 And at that point Mr. Picarella realized, right, of

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Summation - Mr. Jackson

1 course, they got me. Numerous people have observed this. I've
2 got to figure out some way to explain this. And so after all
3 these people had testified, they asked him: Were there times
4 when you went to a conference room to make personal calls?

5 And he's like: Yes.

6 How often?

7 A couple of times a day.

8 And the way he explains the darkness is he's like it
9 was so bright in these rooms most of the time you didn't need
10 to turn a light on.

11 Ladies and gentlemen, this doesn't match up with
12 logic. If it was so bright in the rooms that most of the time
13 you wouldn't need to turn a light on do you think that all of
14 these witnesses would have said that they observed him in
15 darkened conference rooms?

16 Part of the reason that they thought it was weird and
17 that they noticed it is because he's sitting there in the dark
18 with the lights off.

19 But that doesn't even really matter. The point is
20 first he's saying that it never occurred and then later on
21 after all the witnesses have testified to it his testimony
22 changes that this happened a couple times a day. That means
23 that it happened thousands of times because he worked there for
24 years. And he's saying that when he first testified about it
25 he couldn't remember that ever occurring? If you do that twice

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Summation - Mr. Jackson

1 a day, even for a month, don't you think your answer to the
2 question that never occurred would be: Yeah, that probably did
3 occur a couple times.

4 What else? Mr. Picarella didn't tell the truth in his
5 testimony about the fact that he had told people that
6 Ms. Hedges worked for him. Because this is one of the things
7 he did, this weird sort of grandiose thing early on where he's
8 telling people that Ms. Hedges worked for him. And when we
9 asked him about it, we said: At no point did Ms. Hedges work
10 for you, right?

11 Correct.

12 But that's something you communicated to people
13 sometimes, right?

14 His answer: No. I don't believe so.

15 Then we confronted him with a communication where he
16 clearly said that, what you wrote: Eileen works for me?

17 Answer: Yes.

18 That's what he wrote in the communication. Okay. And
19 he attempted to say it was a joke. But when we asked him about
20 it, there's like no smiley faces, there's nothing in there to
21 indicate it's a joke. It's not a joke. And you know it wasn't
22 a joke because Mr. Picarella acknowledged that this is
23 something that Ms. Hedges complained about.

24 Now if it was just a jokey joke -- we saw that they
25 had a very fun relationship early on where, you know, they

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Summation - Mr. Jackson

1 would make jokes with each other, and he would say love you and
2 stuff like that -- if it were just a jokey joke, I don't think
3 that Ms. Hedges would be complaining about it. She was
4 complaining about it because it was strange and it was not a
5 joke. He was telling people seriously. And in his testimony
6 on the stand he denied it until he was confronted with it.

7 What else? During his testimony Mr. Picarella didn't
8 tell the truth about spying on Ms. Parker's private
9 conversations. And this was a bizarre description because we
10 asked him at some point -- first, he was talking about this
11 sort of code of honoring people's privacy to be had. And then
12 he shifted into, we asked him a question: Do you think it's
13 possible there were times you did try to look at other people's
14 screens? And he's like maybe. And he says if it was something
15 I did, I'm not purposely looking at somebody's screen. Okay.
16 Well sometimes you were purposely trying to spy on Ms. Parker's
17 screen? Didn't recall that.

18 Then we showed him clear communication where he is
19 talking to Mary-Jo, the woman who was his friend at the time,
20 who he later on determined was one of the people that was
21 trying to retaliate against him; you know: MP has the IM for
22 EH up on the desktop. I can't read but will try. That's him
23 trying to spy on her screen to see what she's communicating
24 with Ms. Hedges about. And his testimony that this was like:
25 Oh, I was -- it was me looking at it under, consensually

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Summation - Mr. Jackson

1 looking at her screen makes no sense. You don't write this
2 kind of communication that you're going to try to look at
3 somebody's screen if it's just a normal situation where
4 somebody is like, yeah, come take a look at this. He was just
5 offering false testimony about that.

6 We've already discussed this so I won't belabor the
7 testimony. But the testimony about Mr. Karam is just false.
8 No evidence supporting it and there would have been evidence
9 supporting it. One of the ways that you know that there would
10 have been evidence supporting that is because Mr. Picarella
11 admitted that he recorded -- he secretly recorded his
12 coworkers. I mean he talked about that during the course of
13 his testimony: Yes or no? Did you record any conversations
14 with HSBC employees without their knowledge? And he said:
15 One.

16 Now, ladies and gentlemen, I submit to you I just ask
17 you to determine from your own common sense if you believe that
18 the person he was secretly recording communications only
19 recorded one communication. And then I ask you I think the
20 answer to that is obvious. But taking that into consideration,
21 the fact that he was having this practice of secretly recording
22 conversations, the fact that even though he's doing that he
23 comes up with no evidence of retaliation, no recordings of
24 Mr. Karam actually engaging in this kind of conduct is just yet
25 another thing that shows the stuff he's talking about didn't

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Summation - Mr. Jackson

1 happen because if it had he would have it.

2 What else? It's important to note that in his
3 testimony he essentially admitted everything that you need to
4 know to know that he was a terrible coworker who was constantly
5 harassing his colleagues, filing improper complaints about
6 them.

7 This is the one with Mary Bilbrey where he is saying:
8 My boss, Carol Jenner, moved her seat in the past few weeks as
9 directed by Suzy White. Continually throughout the day she
10 hums, sings, and laughs, and talks to herself out loud. It's
11 very distracting.

12 This is in 2013 when he's claiming that his
13 responsibilities are starting to get stripped away. What was
14 he distracted from? Nobody can find him to do any work. He's
15 not doing any work. So what was he distracted from?

16 Putting that aside, I would submit to you that's a
17 very -- it's a very disturbing communication in terms of what
18 it signals about the level of collegiality.

19 Ms. Jenner is a person who was trying to do her job.
20 Maybe she hummed a couple times in the office. And he went to
21 human resources to harass her about that and to suggest that
22 this was part of a pattern of retaliation against him? That is
23 stunning.

24 We asked Ms. Bilbrey about this. And we asked her had
25 you ever seen complaints of this nature being made by a person

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Summation - Mr. Jackson

1 at the executive level of HSBC? Things like the desk drawer
2 incident that he complained about. Somebody left a desk drawer
3 opened. Somebody bumped -- his chair bumped into somebody so
4 that had to be retaliation.

5 We said: Have you ever seen that?

6 And she said: No. We investigated it.

7 Was any evidence supporting the idea that any of these
8 people were trying to retaliate against him ever discovered?

9 No.

10 Did you ever have any executive complaint to you that
11 a colleague was humming too much?

12 No.

13 And no one else ever complained about Ms. Jenner in
14 this way?

15 Just Mr. Picarella.

16 You saw she was rated outstanding by her colleagues.

17 Now, I just have a few more areas I want to talk to
18 you about. One of them is I want to talk very briefly about
19 the damages in this case because it's part of the instruction
20 that you're going to hear and because it's part of the verdict
21 sheet that you're going to see.

22 I want to submit to you if you are taking your oath
23 seriously and you are examining the evidence in this case
24 there's really no logical way that you even get to the
25 discussion of damages. But if you did, even if Mr. Picarella

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Summation - Mr. Jackson

1 could establish liability, he can't establish that he's
2 entitled to any damages. Because, frankly, there's a couple of
3 kinds of damages at play and one of them comes down to this
4 idea that Mr. Picarella is going to try to establish that he
5 was entitled to Eileen Hedges' salary or something like that.
6 That was never developed in the testimony. There is no proof
7 of that. If you look in the record, we admitted Ms. Jenner's
8 paystubs, she was making basically the same amount, not much --
9 essentially the same amount as Mr. Picarella even after she got
10 the promotion. So it's not like he would have gotten a pay
11 raise if he had gotten that job. And the -- looking to the
12 future, looking to the future, what we sometimes call
13 front-pay, it's not really available because, as you can see
14 from Mr. Picarella's performance, even if he could establish
15 that he -- somebody retaliated against him, he was going -- he
16 cannot establish that he was going to be working at HSBC for a
17 long time after that. Not with the way he was working, not
18 with the way that he was treating his coworkers. So he
19 wouldn't be able to establish any damages. And certainly not
20 any punitive damages which you will see in the judge's
21 instructions. He has to demonstrate that there was malice or
22 ill will. And he has to demonstrate that HSBC didn't have a
23 good faith effort in place to comply with the law. And the
24 good faith effort you saw in terms of the policies and the way
25 that the HR dealt with everything. So he can't establish

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Summation - Mr. Jackson

1 damages even if he could establish liability.

2 I just want to talk briefly about the handful of
3 documents that I think Mr. Picarella has focused on during the
4 course of this case. And there are -- there really aren't many
5 because almost all of the documents in this case signal that
6 there was never any retaliation and that the complaints about
7 him go way back before anyone had any knowledge even of some of
8 his complaints.

9 There is one communication that he focused on which
10 was the whole marginalized, his behavior communication between
11 Mr. Karam and Ms. Jenner. And I submit to you that if you look
12 at that communication, if you consider Mr. Karam's testimony,
13 it's clear that what that communication was is Mr. Karam was
14 talking to Ms. Jenner who was having a very difficult time
15 managing Mr. Picarella. You saw he was -- she was the subject
16 of some really unfair petty complaints to HR, even though she
17 had nothing to do with anything involving Mr. Picarella. He
18 was refusing to do projects that she was assigning to him. And
19 so Mr. Karam was trying to help out his colleague and talk
20 about the fact that, look, we're going to not deal with this
21 and we're going to make -- not allow Mr. Picarella's bad
22 collegiality takeover the workplace. That's really all we were
23 talking about there.

24 There's also a communication where Mr. Karam in a
25 conversation was talking to a colleague who is leaving and she

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Summation - Mr. Jackson

1 basically asked him if maybe he could take on some project that
2 she's working on. And he's like, yeah, that would be great,
3 that might give me a chance to dump the whole Picarella saga.
4 If you look at that, that's something that -- I don't know,
5 Mr. Hubbard may make a big deal about it, but the fact of the
6 matter is, if you actually look at the communication, it's
7 clear that what he's saying is that he welcomed an opportunity
8 to be working on something other than his dealings with
9 Mr. Picarella which, as you saw, were continuously
10 dissatisfying because he wasn't doing his job.

11 There's also the Mr. Karam communication where he
12 referred to Mr. Picarella as the HR related problem. And at
13 that point Mr. Picarella, you know, as you saw, he had a number
14 of issues with HR. And Mr. Karam is basically in the
15 communication just talking about his awareness of that. That
16 does not evidence any retaliation. That doesn't evidence any
17 retaliatory animus. All it shows is that he was aware of what
18 Mr. Picarella went to pains to make everyone aware of.

19 Now, there's also Mr. Picarella's calendar. The
20 calendar, you may even be wondering what the significance of
21 the calendar is. It only really relates to the question of
22 damages because Mr. Picarella has this obligation to mitigate
23 any of his damages -- I'm sorry. Let me backup. Because I'm
24 getting ahead of myself. I'm talking about another document.

25 The calendar first has a relationship to the question

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Summation - Mr. Jackson

1 of whether or not he was in the office or at meetings. This is
2 the evidence that they've used to establish that he was at
3 meetings. No witnesses were called who said that he was coming
4 and doing his job. No real evidence of that. Just this
5 Outlook calendar. Well, you saw testimony and you saw
6 communications that he didn't actually show up to a lot of
7 meetings. An Outlook calendar you could fill up just by
8 clicking accept on a bunch of meetings. The calendar does not
9 evidence anything. It's Mr. Picarella's own thing that he's
10 created and it doesn't evidence that he actually was doing
11 work.

12 The thing that I was getting at a second ago is you
13 also got those big books that he put in during the course of
14 his rebuttal testimony that showed his attempt to mitigate his
15 damages by basically his seeking new jobs. Well we didn't go
16 through those. There is no reason to go through them. But if
17 you do, you see it's just a bunch of LinkedIn messages. It's
18 like he's clicking on a bunch of different jobs. Half of them
19 don't even logically appear to be jobs that Mr. Picarella would
20 ever take. There's a job in there that relates to him wanting
21 to be the manager of a waxing center. This is just him trying
22 to fill up a book with as many things as he can to suggest that
23 he was actually trying to mitigate his damages. But, as you
24 heard the during the testimony, what he was really doing was
25 focusing on this lawsuit, doing all the work that he could on

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Summation - Mr. Jackson

1 this lawsuit, attending every deposition, going through all of
2 the documents and focused on that.

3 There is also the one communication from Ms. Jang
4 where she asked if they should add MP, if they should add MP
5 when they were talking about the restructuring. Well he was a
6 poorly performing person and she told you that they always
7 determine whether or not any people who haven't been performing
8 should be added to a restructuring plan.

9 So the last thing that I'll talk about is the 2013
10 360s, reviews, where some of them were positive. You heard
11 Mr. Picarella admit on the stand that in 2013 after the really
12 negative reviews in 2012 he changed his strategy and basically
13 identified a bunch of people who were subordinate to him mostly
14 or who had very limited contact with him and some of them had
15 more positive things to say. But his managers and the other
16 problems he was having with his colleagues continuously went
17 throughout the time he was there. So I submit to you if you
18 look at the totality of it, it paints an uncomplicated picture
19 of Mr. Picarella's poor performance throughout the time that he
20 was there.

21 Now, there are a couple of arguments that Mr. Hubbard
22 may make during the course of his summation. And I have to go
23 first. So I'm taking a little bit more time to try to preview
24 some of these arguments because I don't get a chance to get up
25 after he speaks so I have to anticipate them. The reason I

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Summation - Mr. Jackson

1 don't is because he has the burden. It's his burden of proof
2 to prove by a preponderance of the evidence that this actually
3 occurred, that someone -- the bank was actually trying to
4 retaliate against Mr. Picarella. So he gets to go last. But I
5 have to anticipate some of these. And I ask that you don't
6 just blanketly accept what the lawyers say. Think about what
7 the actual responses are to some of the things -- to some of
8 the arguments that are being made.

9 But one of them is that Mr. Hubbard, I anticipate, may
10 make is that the jury instructions which tell you that under
11 the city law essentially you have to determine that this was
12 a -- the retaliation was a motivating factor in his
13 termination; meaning that you could find for Mr. Picarella if
14 there's anything that suggests that somebody might have at some
15 point thought about this in terms of termination. This is
16 false. Okay. That is not the law. And it's important that
17 you focus on Judge Carter's instructions and follow the law.

18 The keyword is motivating. And when you actually look
19 at the law and you look at this, there is no question what
20 motivated Mr. Picarella's termination was his poor performance.
21 And that is the only thing that the evidence has actually
22 indicated.

23 They may also argue, Mr. Hubbard may also argue that
24 while there is no direct proof there's sort of circumstantial
25 proof. And circumstantial evidence is something that the judge

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Summation - Mr. Jackson

1 will instruct you on. Circumstantial evidence does not mean
2 that you can just take Mr. Picarella's own testimony where he's
3 saying people must have been trying to retaliate against me
4 because I was so good and I ultimately got terminated. You
5 can't just take speculation and turn that into a conclusion.
6 There has to be actual evidence that demonstrates that
7 Mr. Picarella was the victim of retaliatory intent.

8 There is no evidence of that fact. There is no
9 circumstantial evidence. There is no direct evidence. So
10 please don't let the idea of circumstantial evidence be used to
11 sort of confuse you about what they have to establish. They
12 have to meet their burden.

13 He may also suggest that some witnesses should be
14 disbelieved because he would ask them about some random bit of
15 their deposition and they're like I don't know. Some of these
16 depositions happened a long time ago. Unlike Mr. Picarella,
17 these witnesses have not been working full time on this. They
18 have other jobs and responsibilities. And so if you look at
19 what happened during the course of the testimony, I think it's
20 very clear that the testimony was very consistent and I submit
21 to you very credible throughout. So please don't let any
22 random bits of testimony distract you from looking at the
23 entirety of the witnesses and how credible and how sincere all
24 of the witnesses were that testified in this case.

25 There also may be an argument that the standard under

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Summation - Mr. Jackson

1 the city law is so wildly different from the federal standard.
2 Again, focus on the judge's instructions. Because in both the
3 city law and in the federal law one thing is clear: He has to
4 demonstrate that retaliatory intent was the reason -- that that
5 existed and that was part of why he got terminated. And there
6 is no evidence of that kind of retaliatory intent.

7 The federal standard is a higher standard than the
8 city standard. But he does not come close to meeting the city
9 standard. And so I just ask you not to be distracted by that.

10 Now, I'm coming close to the end. I have just a
11 couple of final things to talk to you about. One of them is
12 just some of the red herrings that I think exist in this case.
13 I just want to point out the leak investigation. It's a
14 complete distraction. If you think that Mr. Picarella got
15 fired because people thought that he leaked information, okay,
16 that means that you have to find in favor of HSBC under the law
17 because getting fired because of a leak does not mean
18 retaliatory animus.

19 Now, the fact of the matter is he didn't get fired for
20 a leak because all the witnesses told you they investigated him
21 for the leak as they were required to do to fulfill their
22 responsibility to their customers. But the reason he got fired
23 was performance. But even if he could establish he got fired
24 because of the leak, that does not mean that he's established
25 retaliation. It's a red herring. It's meant to distract you

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Summation - Mr. Jackson

1 from what the actual evidence demonstrated in this case.

2 Also, if you think that Mr. Picarella, that people
3 didn't like his random complaints about regulatory issues, that
4 also does not equal retaliatory animus. He could have gotten
5 fired for that reason and that would just mean that that's why
6 he got fired. It does not mean that he meets his burden.

7 But there is no evidence to support that. It's
8 something that was sort of suggested. But it's not actually
9 anything that there's any evidence to support.

10 There's also a lot of innuendo that came up during the
11 course of this case. I hope that during the course of the
12 testimony none of you were offended by some of the things that
13 you had to hear about I think what are -- to any of us some
14 relatively uncomfortable facts. Nobody likes hearing about the
15 details of anyone engaging in sexual harassment of another
16 person or people's difficult situations at work. You heard
17 that they brought out that Ms. Parker was terminated at one
18 point. And, again, we submit to you that that's a distraction.
19 She was terminated for a situation that we had to bring out if
20 it was raised that she was terminated. That has nothing to do
21 with retaliation or Mr. Picarella's claim. She had to be
22 terminated because, you know, of an unfortunate situation where
23 somebody's wife came onto the trading floor and caused a scene.

24 MR. HUBBARD: Objection. There is no evidence of
25 that, your Honor.

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Summation - Mr. Jackson

1 MR. JACKSON: It's in the record.

2 THE COURT: This is argument. Go ahead. Overruled.

3 MR. JACKSON: And someone came onto the trading floor.

4 Someone's wife came on the trading floor and basically

5 Ms. Weiss explained to you that they asked some questions to

6 Ms. Parker about that. She gave false statements about it.

7 Under HSBC's rules she had to be terminated. They continued to

8 investigate the sexual harassment and HSBC has dealt

9 appropriately with everything having to deal with Ms. Parker

10 completely separately from this case. That's a red herring and

11 a distraction that has nothing to do with Mr. Picarella's

12 attempt to capitalize on this situation, opportunistically. It

13 has nothing to do with it. It's a distraction.

14 And similarly this whole PCC report things that there

15 was a lot of noise about during the case. Nothing -- it's a

16 red herring. Okay. The witness explained to you that the

17 reason that he was on the PCC list is because it also includes

18 people who made complaints. It's a system where you have to

19 put in names of different people. There is no indication that

20 they were trying to put him on a list to get him fired. If

21 they wanted to fire him why wouldn't they have just fired him

22 instead of paying him a million dollars?

23 No one was trying to retaliate against Mr. Picarella.

24 Everyone was trying to give him every opportunity to do his job

25 and he refused.

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Summation - Mr. Jackson

1 Now I just want to go quickly through the verdict
2 sheet, which the judge is going to explain to you in more
3 detail, but this is the verdict sheet that you will ultimately
4 get in this case. And you will see it has boxes to check
5 related to different aspects of this. I think that what is
6 going to be important is the answer to each one of these is no.
7 For some of these -- the first one, no, you stop.

8 THE COURT: Counsel, take that down.

9 Go ahead.

10 MR. JACKSON: You will see the instructions on the
11 verdict sheet, but the point is you can look at it, you can
12 follow it, the answer to those questions is no.

13 Now one of the other things -- I'm wrapping up. One
14 of the other things the judge is going to instruct you is that
15 sympathy cannot play a part in your role in your determination
16 of this case. To whatever extent you feel sympathy for
17 Mr. Picarella, first of all, I submit he's fine. He made
18 millions of dollars on Wall Street, he's fine. But to whatever
19 extent you feel sympathy, you got to put it out of your mind,
20 and you have to make your determination on the evidence, on
21 what the actual law is, and what the evidence actually
22 demonstrates.

23 And I submit to you the evidence has only demonstrated
24 one thing, and these laws, as we said before, they're
25 important. It's a big deal for somebody to make these kinds of

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Summation - Mr. Jackson

1 accusations against their co-workers, for them to accuse of
2 their co-workers to engage in this grand scheme to retaliate
3 against them for complaining about sexual harassment. It is a
4 very big deal for each and every one of the people who are
5 subject to what are ultimately false allegations, and I ask you
6 to take that into consideration in evaluating the witnesses and
7 evaluating the entire case.

8 One of the most important things and the judge is
9 going to instruct you, is that Mr. Picarella's personal
10 subjective belief that he was retaliated against is not
11 sufficient to meet his burden of proof. It is not enough for
12 him to show his subjective belief, feelings, suspicions or
13 speculation that the reasons stated by HSBC for the alleged
14 adverse actions are now genuine. His subjective beliefs are
15 not evidence. The actual testimony you heard from objective
16 witnesses about things that actually happened or didn't happen,
17 that's the evidence. The documents you saw, that's the
18 evidence.

19 We told you at the beginning of this case that what
20 this case was really going to be about was greed, opportunism
21 and laziness. I submit to you, ladies and gentlemen, that
22 throughout the course of this case that is what you saw. You
23 saw a remarkable number of indications that Mr. Picarella just
24 refused to do his job throughout the time he was there, that
25 from the beginning all the way to the end there was greed in

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1 terms of the whole thing being triggered by being upset about
2 his bonus not being big enough; and ultimately opportunism, the
3 timing, everything shows that he was trying to take advantage
4 of someone else's misfortune. That's not okay. That's not
5 right. You should reject it. You should make your verdict
6 based on the evidence. And when you do that, there's really
7 only one verdict that could possibly be consistent with that,
8 and that is a verdict that we humbly ask you to return: No
9 liability in favor of HSBC.

10 I deeply appreciate your time and your attention
11 today. Thank you. Thank you very much.

12 THE COURT: Okay. So members of the jury, we're going
13 to take a 20-minute break and then you will have closing
14 argument by plaintiff's counsel.

15 Don't discuss the case amongst yourselves or with
16 anyone else. We'll see you soon.

17 (Jury not present)

18 THE COURT: So here's what I suggest at this point:
19 The jurors are going to get a 20-minute break. We ordered
20 lunch for the jurors, it should get here around 1:00 or so. So
21 in terms of timing, plaintiff's counsel will deliver his
22 closing argument. After that we'll give the jury a short lunch
23 break, since their lunch will already be here. At that point
24 we can discuss any corrections to the charge, and after a short
25 lunch break I will charge the jury.

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1 MR. HUBBARD: Judge, respectfully, I don't think
2 that's fair. It's 12 o'clock now, it's going to be almost
3 12:30 when they get back and I'm able to start, and I will have
4 to argue from 12:30 to almost 2 o'clock. I don't think that's
5 fair.

6 THE COURT: Why not? That's an hour and half. Not
7 fair to whom?

8 MR. HUBBARD: Not fair to me, number one. Obviously I
9 will abide by the Court's schedule, but I have to argue while
10 the jury is sitting here during their lunch hour. It's from 12
11 to 2 o'clock when I do my argument. Why can't we lunch now and
12 come back and then let me argue and you instruct the jury?

13 THE COURT: Lunch isn't here now, for one. If you
14 want to break it up -- if you want to stop in the middle of
15 your closing argument, I feel that's more unfair if you want to
16 do that. We can do that and go until 1 o'clock, stop and take
17 a very truncated lunch break and discuss the charge and then
18 finish your closing argument.

19 MR. HUBBARD: I would much prefer to do that only
20 because the jury -- they are going to be -- their stomachs are
21 going to be growling, they're going to be hungry, and it will
22 be difficult for me to keep their attention over the lunch
23 hour. I much prefer to do it after a short lunch.

24 THE COURT: I'm no gastroenterologist, but typically
25 speaking, talking about keeping people's attention, it's much

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1 harder to keep someone's attention after lunch than before
2 lunch.

3 What is defense counsel's position?

4 MR. JACKSON: The Court's first plan is the best one,
5 but we defer to the wisdom of the Court.

6 THE COURT: We'll do that. We'll break that up. And
7 then we'll discuss any issues with the charge over the
8 truncated lunch break, although perhaps we could do this now.

9 Counsel, have you had a chance to look at the charge?

10 MR. HUBBARD: We can do it now, sure.

11 THE COURT: Go ahead.

12 MR. HUBBARD: As I understand what your Honor did --

13 THE COURT: I am going to -- here's what I also need
14 to add, on page 20, it was on page 20 in one of the drafts
15 where I talk about Mr. Picarella's claims, to add -- the claim
16 about the sexual harassment of a female co-worker -- the filing
17 of this EEOC charge, the filing of the charge with the EEOC.

18 MR. BORTNICK: I'm trying to find it now in the most
19 recent --

20 THE COURT: It's the section before you start getting
21 to the elements, the overall sort of the description.

22 MR. BORTNICK: It was on page 20. Right now says
23 Mr. Picarella alleges the defendant retaliated against him for
24 reporting sexual harassment of a female co-worker by an HSBC
25 executive, and you were going to add that, which not in the

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1 current one.

2 THE COURT: That's what I will add, yes, and the
3 filing of the charge with the EEOC.

4 MR. BORTNICK: Right.

5 THE COURT: The other thing I would like to add is a
6 change in the jury instructions -- nothing that substantive,
7 but on page 40 when I talk about if you want any testimony read
8 back to you, we'll change that to if you want any testimony
9 provided to you, and same thing the other way, that way we have
10 the option of having it read back, or if it's extremely
11 voluminous we could send the transcript in to them.

12 MR. BORTNICK: Sure.

13 MR. JACKSON: Your Honor, one thing, your Honor had
14 asked if the parties wanted to send the exhibits back. It's
15 our request that we wait for jurors to request specific things
16 before we send them in.

17 THE COURT: That's fine. If both sides don't agree, I
18 won't send it in.

19 MR. HUBBARD: Sorry, your Honor, I was distracted.
20 What did your Honor say about the exhibits to the jury?

21 THE COURT: Defense counsel doesn't want to send them
22 in. If both parties consent, I will send them in. If both
23 parties don't consent, I will not send them and the jury can
24 request whatever they want.

25 MR. HUBBARD: Thank you.

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1 THE COURT: Anything else on the jury charge?

2 MS. LEVIN: Yes, may I seek one point of clarification
3 about the jury charge?

4 THE COURT: Yes.

5 MS. LEVIN: It's on page 24, which we discussed
6 earlier this morning. I apologize that I have not had a chance
7 to go back and look at the transcript of the discussion from
8 this morning, but I thought that we had agreed that the phrase
9 "were not, in fact, motivating factors" was going to be
10 changed. So I just respectfully request the Court clarify its
11 ruling on that.

12 THE COURT: Yes, that has been changed.

13 MR. HUBBARD: May I ask you one question, your Honor,
14 please?

15 THE COURT: Yes.

16 MR. HUBBARD: You indicated that, of course, it's the
17 standard practice if the both parties don't agree the exhibits
18 don't go back unless the jury requests them.

19 THE COURT: Right.

20 MR. HUBBARD: In this system that we are using now,
21 when exhibits are shown to the jury and portions of them are
22 shown to jury, does that make a defense in whether or not they
23 should have access to the full exhibit as opposed to just the
24 sample of them?

25 THE COURT: No. The jury will let us know what they

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1 want. If they ask for the exhibit, it seems to me the entire
2 exhibit goes in. The fact that counsel may want to highlight
3 one portion, that's counsel's right and counsel's decision.

4 Anything else in terms of the charge?

5 MR. BORTNICK: I think your Honor took out the -- I
6 must be looking at the wrong one. Your Honor took out the
7 non-retaliatory -- sorry, your Honor took out the two sections
8 that really related to section five of the jury verdict, you
9 lifted that wholesale out of the jury charge?

10 THE COURT: Right.

11 MR. BORTNICK: That's what was requested.

12 THE COURT: Anything else?

13 MR. JACKSON: No, thank you, your Honor.

14 THE COURT: Counsel can get their eight-minute break
15 in and we'll come back.

16 (Recess taken)

17 THE COURT: Let me confirm with counsel that there are
18 no additional issues with the most recent copy of the verdict
19 form.

20 MR. HUBBARD: None from the plaintiff, your Honor.

21 MS. LEVIN: No, your Honor, not from the defendant.

22 THE COURT: All right. Let's bring the jury in.

23 Plaintiff's counsel, what's the estimated time for
24 your closing argument?

25 MR. HUBBARD: Well, I'm still on the 75 minutes. That

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1 was a little longer summation than I had expected. There was a
2 lot covered. I will look at my notes, Judge, and I will do my
3 best to be as judicious as I can.

4 THE COURT: I think this defense counsel went about 94
5 minutes. Some of that was taken up with the sidebar, but when
6 the jury gets assembled we'll bring them in and have closing
7 argument by plaintiff's counsel.

8 And I guess we'll go until about 1:15, does that work?

9 MR. HUBBARD: Absolutely.

10 THE COURT: 20 minutes after lunch.

11 MR. HUBBARD: Sorry?

12 THE COURT: We can go until 1:15, which would be about
13 55 minutes, and you can have your remaining 20 minutes after
14 lunch. I will give you more time. I won't shut you down after
15 75 minutes.

16 MR. HUBBARD: I thought you were going to break for
17 lunch before my summation.

18 THE COURT: No, no, no, I said you start your
19 summation and then in the middle we break for lunch.

20 MR. HUBBARD: I think that's terrible, your Honor,
21 terrible for me to have to break my argument. I thought you
22 said that we were going to take a lunch and then I --

23 THE COURT: That's not what I said. I originally said
24 that we were going to go straight through and have lunch. You
25 objected. I said we'll break it up and do it in the middle of

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1 your summation then. That's why I had the comment about it's
2 usually --

3 MR. HUBBARD: Judge, I don't want to break it up, and
4 I don't think it's fair for me to have to argue from 12:30 to
5 2:00 or 2:15 to this jury, but I abide by your --

6 THE COURT: 12:30 to 2:15 is 105 minutes, that's quite
7 a bit longer than 75 minutes. If you want go straight through,
8 we can do that, but I was breaking it up because you objected.

9 MR. HUBBARD: No, I will do it at one time.

10 THE COURT: You want to go straight through?

11 MR. HUBBARD: Yes, sir. If we can't take a break,
12 we'll go straight through.

13 THE COURT: That's what we'll do.

14 Defense counsel have no objection to that?

15 MR. JACKSON: No objection, your Honor.

16 THE COURT: Plaintiff's counsel, if you prefer I could
17 let the jury know when they come out that we ordered their
18 lunch and their lunch will be waiting for them at the end of
19 your summation and there's a microwave and refrigerator. Do
20 you want me to tell them that?

21 MR. HUBBARD: That would be good.

22 THE COURT: Any objection to that by defendant?

23 MR. JACKSON: No objection, your Honor.

24 THE COURT: Okay.

25 (Continued on next page)

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Summation - Mr. Hubbard

1 (Jury present)

2 THE COURT: We are now going to have plaintiff's
3 counsel's closing argument. In terms of schedule, we ordered
4 lunch for you. Your lunch will be ready for you at the end of
5 plaintiff's counsel's closing argument. And we do have a
6 microwave and refrigerator in the jury room for you to use.

7 Go ahead, counsel.

8 MR. HUBBARD: Thank you, your Honor.

9 Ladies and gentlemen, it's now our turn to give a
10 summation to you. But before we begin I want to do the same
11 thing as my brother did and thank you for your diligence in
12 sitting through this trial with us. We have great respect for
13 your jury service. We realize it's a time of year when you're
14 all busier than you ordinarily are with holiday chores and
15 family things, and so we realize it has been challenging a bit
16 in this holiday season to be here so long, and we appreciate
17 your service. We're not unmindful, and we are grateful for
18 that service.

19 I want to go back and begin with the way we introduced
20 this case, and that was that in the spring of 2012
21 Mr. Picarella reported to HSBC the sexual harassment that he
22 observed by Ms. Hedges involving Ms. Parker, and continued that
23 reporting process through the spring of 2012.

24 And then following that into the next couple of years
25 the evidence will show -- we'll go through it this afternoon,

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Summation - Mr. Hubbard

1 the evidence shows that there were various times when he
2 suffered adverse employment actions as a result of those
3 complaints.

4 You know that those complaints began in February or
5 March when he spoke to Ms. Hedges. You may recall that he
6 spoke to her first, that Mr. Pizzimbono -- he talked to
7 Mr. Pizzimbono and he said I want to talk to her first, I don't
8 want to report her, I want to talk to her and see if I can ask
9 her to stop this conduct. When that happened -- did not
10 happen, he went back to Mr. Pizzimbono and asked to continue to
11 do that, and only in April of 2012 did he go in to see
12 Ms. Weiss and report to human resources of what had happened.

13 There's a debate in counsel's argument this morning,
14 that was a debate about when Mr. Picarella added the
15 information about what happened at that Key Largo conference in
16 March, and there was some suggestion that Mr. Picarella's dates
17 and times were off. The testimony was that Mr. Picarella did
18 not go to human resources or to management with any information
19 about that Key Largo conference, that after it happened there
20 were rumors all around the sales desk about what happened, and
21 that Mr. Pizzimbono and Ms. Weiss called Mr. Picarella in and
22 said have you heard about this Key Largo conference, which he
23 did no not attend. And at that time, in April, he said no, I
24 haven't heard about it at all. He didn't take some opportunity
25 to launch some further reports, he said I haven't heard

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Summation - Mr. Hubbard

1 anything about it. They called him back in in June and asked
2 him if he heard anything, and he told them. He didn't initiate
3 any contact with human resources, the record would suggest.

4 We saw that Mr. Pizzimbono -- a little different than
5 we heard this morning, but when Mr. Pizzimbono was talking to
6 Mr. Picarella about the complaints he was making,
7 Mr. Pizzimbono was first to tell him that not to worry about --
8 Mr. Picarella was worried about making these complaints, would
9 he be a tattletale, would he offend people, would he be
10 retaliated against. Mr. Pizzimbono said no, you will not. I
11 encourage you to do that. We appreciate that. That's what the
12 company wants you to do. And he said in that memo that we
13 think you're showing courageous integrity.

14 Let me see, Peter, number 125, please, on the screen.

15 Mr. Pizzimbono wrote about this and said Mike told me
16 he was afraid of being labeled as a problem. I told him that
17 he should realize that myself and others had encouraged him to
18 provide details and examples of what he experienced so that we
19 could address, and that he would never -- and we would never
20 hold that against him, as it was our responsibility to provide
21 him with a comfortable and safe work environment.
22 Additionally, we're all subject to the same rules and
23 standards, and we understand that it is critically important
24 that they be upheld. It takes courageous integrity to do that.
25 Try that on with what you are hearing this morning from HSBC,

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Summation - Mr. Hubbard

1 that him going in and reporting this stuff was opportunism,
2 that he was trying to take advantage of some else's misfortune.
3 That's his manager.

4 What you will see is -- what this reflects, talking
5 about these performance reviews -- what you see and what you
6 heard this morning is an effort to rewrite history. I'm going
7 to go through it with you. It's an effort to change what
8 happened. The performance reviews are an example, and I will
9 go over it with you, but now three strong is now three poor,
10 three no good. They look you right in the eye, look you right
11 in the eye and ask you to ignore what they wrote and to set it
12 aside as being some type of irrelevant part of the history.

13 You may recall that Mr. Picarella, when he complained
14 to Ms. Bilbrey, he complained about three of Mr. Pizzimbono's
15 deputies at the same time he made those complaints.

16 Let's talk a minute about Mike sitting in the dark
17 room just off the floor. You heard from his testimony that he
18 did sit in some conference room to make personal calls. You
19 saw that he had his appointment calendar that had meetings all
20 over the place. Mr. DeLuca, none of those folks had any idea
21 where he was when he was attending his meetings.

22 There's not a single report -- all this not at his
23 desk stuff, Waldo stuff, there's not a single report in a
24 single company document, not a single manager, not one, all
25 these managers for four years documenting his performance, not

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Summation - Mr. Hubbard

1 a single one ever wrote Mr. Picarella is in dark conference
2 room on his phone not doing his work. Where does all this come
3 from? It comes because we're in a courtroom, that's where it
4 comes from.

5 The worst, Mr. Karam, after he gave him the off-track
6 review in November 2014 -- he testified here in front of you
7 before I cross-examined him that his performance continued to
8 deteriorate from November 21, 2014 until he was fired in late
9 March 2015.

10 Here's what he said: What was the performance that
11 you were evaluating and finding to be deficient after
12 January 15 of 2015? Well, for starters he was responsible to
13 collate sales commentary on a weekly basis. It was important
14 that he would collect information from business markets and any
15 issues that had arisen, and that information would be
16 consolidated into a report that would be shared with senior
17 management in London. So there are instances where that wasn't
18 being carried out. There were some issues regarding his
19 access, et cetera.

20 He was locked out and shut off all through that period
21 of time. And so the observation that he was continuing to get
22 worse just has no support in the evidence at all. And
23 certainly it's obvious that he either forgot what happened or
24 got it confused, but that testimony was absolutely not
25 accurate. He was locked out and shut off.

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Summation - Mr. Hubbard

1 HSBC wanted to talk about witness credibility, so I
2 want to talk to you about some of the other examples of where
3 his protected activity leads to retaliation.

4 Let talk a little bit about Mr. Picarella being passed
5 over for the Hedges job and Ms. Jenner being selected. No one
6 has alleged here, in fact it's the opposite, that Ms. Jenner
7 wasn't qualified for the job, that she was not a qualified
8 person at all.

9 What our view is, and what Mr. Mullen said on his
10 testimony, was that Mr. Picarella was hired to succeed
11 Ms. Hedges. He was hired as her deputy and he was hired to be
12 her successor, that he had far more experience than she did in
13 all areas, and that having -- and that in selecting her for the
14 job and having him report to her was extremely damaging to his
15 career at the firm. His testimony was quite clear. Let me
16 recall a little bit for you.

17 Did there come a time that a candidate was identified
18 for the job?

19 Yes.

20 Who was that the candidate?

21 He says: Hiring Mike.

22 When you hired him, what were his qualifications?

23 He had a significant amount of sales experience.

24 Were you searching for a deputy? Did you explore the
25 credentials of a candidate who was working in the bank at that

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Summation - Mr. Hubbard

1 time? Ms. Jenner was working at the bank at that time.

2 There were no internal candidates that were viable at
3 that time.

4 Did you know Carol Jenner?

5 Yes.

6 Was she in the organization at the time?

7 Yes.

8 Was she ever considered?

9 No, never even spoken to as an option.

10 She wasn't a viable candidate?

11 She wasn't a viable candidate, just in my view, but
12 there were a group of people that were making this decision,
13 and there was no viable internal candidate.

14 Did you consider Mr. Picarella's operational risk
15 experience?

16 He said yes.

17 We asked him at that time if he would put
18 Mr. Picarella in the performance evaluation queue, what rating
19 he would have received?

20 He said two.

21 When you were in New York, did you hear any criticism
22 of his work performance at any level?

23 No. There was not one conversation I ever had with
24 anybody that Mike was not the logical successor to Eileen
25 Hedges. If

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Summation - Mr. Hubbard

1 I were to say to you that someone characterized him as
2 lazy, what would you say?

3 That would be incorrect. I was generally one of the
4 earlier people in to work. Mike would have been, on that sales
5 team, generally the earliest person to work within that sales
6 team. When I was working late, he was generally -- I would
7 generally see Mike there. And there's two ways of looking at
8 that. You can say someone is putting long hours, et cetera.

9 And at any point while you were in New York did you
10 hear any criticism of his work performance from any source?

11 Not one conversation, he said.

12 And I asked him the practical effect of having him
13 passed over for that position.

14 And he said that the practical effect for Mike, bear
15 in mind she's a VP and Mike is an SVP, is basically to say that
16 he has no future in the organization. In my career I have
17 never seen -- in my career I have never seen a situation such
18 as this one we're now talking about where you have a more
19 junior person that's the boss of a more senior person. So it
20 was tantamount -- this is Mr. Mullen -- that was tantamount to
21 saying: No future.

22 Nobody is criticizing Ms. Jenner at all. While we're
23 talking about Ms. Jenner, Ms. Jenner was not one of the people
24 who had any difficulty with Mr. Picarella.

25 That's false. Let's look at Ms. Jenner's performance

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Summation - Mr. Hubbard

1 review. Do you have that one, Peter? It's in -- I think it's
2 in May of 2013, I think it's 190.

3 Ladies and gentlemen, this is Ms. Jenner's 2012
4 performance review on Mr. Picarella. You see in the feedback:
5 Myself, Mike is an easy person to work with. He's found to be
6 professional and realistic and is a good partner to CMB and
7 COBAM. So she certainly wasn't reporting any animosity toward
8 him, any difficult to work with him in any way.

9 Let's talk about a little bit about what happened to
10 Mr. Picarella after he was passed over for the job.

11 As he testified, by mid 2013 HSBC had stripped him of
12 his major job responsibilities as a senior vice president and
13 assigned Mr. Karam as his supervisor. Mr. Karam did not work
14 in his group. Mr. Karam was assigned by Ms. White specially to
15 supervise Ms. Picarella. Ms. Jenner no longer supervised him,
16 he now has a special supervisor.

17 As you saw in the evidence, his name was taken off the
18 organizational chart. He found out, he complained, and they
19 put him back on.

20 Ms. Weiss put him on a list of employees accused of
21 misconduct. HSBC attempted to make light of the facts that he
22 was listed as a personal conduct case. You will see in a
23 moment when Ms. Weiss put him on that list, she wasn't listing
24 cases that had been reported. She didn't even put Ms. Hedges'
25 name on it. She put Mr. Picarella's name on the list of

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Summation - Mr. Hubbard

1 employees who have engaged in misconduct or violated the firm's
2 values. What does that hostility come from? This is in the
3 middle of 2013.

4 Again you saw in the middle of '13, we'll look at it
5 in some detail, Mr. Karam disparaged him by referring him to
6 senior management all the way to London as a human resources
7 problem after he filed an EEOC charge.

8 He testified here that he called him a human resource
9 problem because he filed an EEOC charge. The Court will tell
10 you in its instruction that that was protected activity, just
11 as this case here is a protected activity. Asserting these
12 rights under state and federal law, city law, is protected
13 activity. So he engages in protected activity and he gets
14 characterized all the way to the top as a human resource
15 problem.

16 By 2014 the evidence shows Mr. Karam stripped him of
17 all of his job responsibilities down to where he candidly
18 admitted -- he didn't make any bones about it, he candidly
19 admitted that he had only about ten percent of his time that he
20 had work to do. He didn't sit tight either.

21 October 20, 2014, just before the review, he writes to
22 Ms. Bilbrey, the head of human resources, I have continued to
23 complain in desperation to human resources, and still I sit
24 with no more than one hour of work a week on average.

25 This is to the head of human resources. Does anybody

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Summation - Mr. Hubbard

1 come down and say: Wait a minute, Mr. Picarella, you can do
2 this, you should be doing this, Jim needs help. Nothing. He
3 doesn't hide. Several of these are in the record, you will see
4 them.

5 Even that minimal effort is that of an administration
6 or cutting and pasting commentary. At times months have gone
7 by with no work at all. My reviews are given to me many months
8 after the firm's mandated deadline, if they are given at all,
9 and they last only a few minutes. A year and a half has passed
10 with hardly any purpose or work.

11 Now this man is writing, this putting this in writing
12 to the head of human resources. Is he manipulating the
13 marketplace? He is trying to create some sort of false
14 accusation? He puts it right on the record to the head person.
15 What's he hiding? What's he manipulating? He puts it right on
16 the record. A year and a half has passed with hardly any
17 purpose or work.

18 By 2014 we're down to the ten percent situation, and
19 that ten percent situation, the effect of that is to disable
20 him. Not only does he get shut out and shut off, but now he
21 has no work to do. And he didn't cause that. That was done by
22 HSBC.

23 I want to discuss with you for a minute again the
24 issue now that you're asked to decide and what the instructions
25 may say to you about that as counsel review with you for a

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Summation - Mr. Hubbard

1 minuted. The issue for your determination here, the primary
2 issue, is first under the city human rights law -- applies here
3 because Mr. Picarella worked in New York City -- under the city
4 human rights law is whether protected activity, these reports
5 of sexual harassment, his complaints about retaliation, was a
6 motivating factor in HSBC's decision to engage in conduct that
7 was reasonably likely to deter an employee from engaging in
8 protected activity. In other words, was it a motivating factor
9 in HSBC's decision to engage in an adverse employment action, a
10 motivating factor?

11 What you will learn is it does not have to be the only
12 reason that he was retaliated against, it does not have to be
13 main reason he was retaliated against under the city law. It's
14 a little different test than the federal law. Under the city
15 statute if it's a motivating factor, there is causation, and if
16 the other standards are met Mr. Picarella would be entitled to
17 your verdict.

18 Well go over the verdict form in a minute. There are
19 a couple of other questions that counsel mentioned, such as did
20 he engage in protected activity, did the firm know that he
21 engaged in protected activity, and those things.

22 Whether the adverse actions we see -- the adverse
23 employments actions we see were motivated by his complaining
24 about sexual harassment at HSBC, under Title VII under the
25 federal law, there's a different test. As counsel said, there

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Summation - Mr. Hubbard

1 is a but-for causation standard. And that test will be, under
2 the federal statute, that his protected activity, his
3 complaints, under that standard would have to be the main
4 reason that if he was retaliated against it would have to be
5 because of those -- of his protected activity.

6 Let me talk to you a moment about the plaintiff's
7 burden of proof. As you obviously can tell, this is not a
8 criminal case, this is a civil case. So the standard here is
9 preponderance of the evidence. That means the greater weight
10 of the evidence. If you were in a criminal case, some of you
11 may have been on criminal juries, because the life and liberty
12 is at stake the standard is much higher, the standard is beyond
13 a reasonable doubt, and we all know that.

14 In a civil case the standard is the greater weight of
15 the evidence. The judge going to explain all this to you, but
16 it's the preponderance of the evidence, and that means the
17 greater weight of the evidence. So you will see lawyers
18 walking around the courtroom pretending like they have a scale
19 in their hand, and they balance it, that's what you do. If it
20 tips in favor -- if it tips, if it's more likely than not -- if
21 the greater weight of the evidence tips the scale in favor of
22 Mr. Picarella's retaliation claim, he's entitled to your
23 verdict. If it tips the other way, the defendant is entitled
24 to it. That's what the greater weight of the evidence means.

25 Evidence of retaliation beyond the fact that he was

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Summation - Mr. Hubbard

1 hired to replace Ms. Hedges, without question, and was then
2 passed over for that job for no reason. That appears in this
3 record. That's the first instance that we say in which he
4 was -- there was a motivation to harm him by an adverse action.
5 Clearly the fact he was not given the job that he was hired to
6 do in these circumstances is an adverse bad employment action.
7 As Mr. Mullen said -- basically you heard Mr. Mullen, he said
8 it was fatal to his future at the firm.

9 But let's go past that. Let's go past that. We've
10 talked about the organizational chart, we've talked about the
11 personal conduct list, I want to show you that in a moment.
12 Maybe I will just get -- let me get the personal conduct list,
13 Peter, which is, I believe, 131.

14 Ms. Weiss, five days after he's been passed over for
15 this job, Michelle Parker, James Rist, Mike Picc.

16 Is there a second page of this? I think there's a
17 list somewhere there. I might have the wrong exhibit.

18 Sorry, go back to the top. Go back to the list of
19 employees. Go back to the list.

20 Ms. Weiss, September 9, 2012, Eileen Hedges, the woman
21 who Mike reported this information the sexual harassment
22 information about and who was then relieved of her managerial
23 responsibilities is not on the list. This is not a list of
24 cases, this is a list of people who are believed to have
25 personal conduct issues.

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Summation - Mr. Hubbard

1 Peter, let me have -- the last one of those is 214.
2 It's 185. Let me see 185, please, and show you one other
3 personal conduct case list.

4 There are several in the evidence, if you get a chance
5 to look at them, there are several, but this one is 2013, this
6 is Ms. Jang. Remember she works for Ms. Weiss, PCC reporting.
7 Ms. Weiss, can you guys provide any additional names to me, and
8 I will try to complete. Jenny, now we have Hedges, Picarella,
9 Goodwin and Legoretta. Hedges, Goodwin and Legoretta you will
10 see in the record are the three deputies of Mr. Pizzimbono that
11 were accused of attempting to push Ms. Hedges onto
12 Mr. Legoretta at his presence at the off-site conference, and
13 Mr. Picarella's name comes to the list.

14 Go to the second page. Purpose, this quarterly report
15 is a group-wide report of conduct cases that are alleged or
16 determined to contravene HSBC values and behaviors.

17 There was testimony that this bad list did not -- was
18 not circulated to management. It certainly was circulated
19 throughout the human resources function at the firm.

20 And what happens later? We see later in early 2014 he
21 appears on this list, and Ms. Jang says: Is there anybody else
22 in the business we want to let go? And they write back --
23 somebody asked that question, she writes back: How about MP?
24 I will show that to you. How about Mike Picarella? Why is
25 human resources suggesting Mr. Picarella should be terminated

GCETPIC4

Summation - Mr. Hubbard

1 because he ends up on the bad conduct list? Maybe you will
2 find there are other reasons, but that's one of them.

3 193, please, Peter.

4 This is a nice response. First -- he's helping
5 Ms. Jenner draft a note to Mr. Picarella. First he says: Feel
6 free to drop the "Thanks." She was writing him a nice note.
7 She got along with him just fine. Mr. Karam was hostile to
8 this man. It's obvious from watching his testimony. He was
9 hostile to him. Why don't you drop the "thanks" from your
10 letter. No need for it. Down at the bottom he says: If he
11 responds, we'll marginalize his behavior. That's a friendly
12 comment from your boss.

13 After this Mr. Picarella files his EEOC charge. That
14 charge is not public. That charge is filed with a government
15 agency. It's not in the newspaper. It's not public. It's a
16 government charge to generate some kind of investigation.

17 After that charge is filed, Mr. Karam does not speak
18 to him. Mr. Karam has just been made his manager. Mr. Karam
19 does not speak to him for the next three months.

20 Do you have 205? First line.

21 Mike Karam has not met with me or spoken with me in
22 person in approximately three months or about the time of my
23 filing of the EEOC charge. That's his manager. I guess that
24 telegraphed to everybody in the group what Mr. Karam thought
25 about Mr. Picarella.

GCETPIC4

Summation - Mr. Hubbard

1 209, please, Peter.

2 Mr. Rose was in London. Mr. Karam was responding. He
3 was coming to New York to meet with Ms. White and Mr. Descamps.
4 There was an email about what is going on. Okay, speak
5 tomorrow. He says: Sales issues? And Karam writes back:
6 Sales issues, Picarella, human resource problem. That did him
7 a lot of good in this organization to be viewed as a human
8 resource problem.

9 There are laws that apply here. There are laws that
10 prohibit retaliation. I'm going to show you in a minute the
11 company's own policy that says that you must report unlawful
12 conduct, but yet this man reports it and he's a problem. The
13 law is not a problem, it's the conduct that's the problem.

14 Do you have the anti-retaliation policy, Peter?

15 This is the anti-retaliation whistleblower policy.
16 HSBC relies on the cooperation and support of individuals who
17 have witnessed or experienced possible incidents of alleged
18 wrongdoing or violation of company policy to report these
19 instances, just like Mr. Picarella, just like Mr. Pizzimbono
20 said. HSBC makes fun of this man today because he had the
21 courage to follow this policy. It's their policy. It's also
22 the law that Judge Carter is going to give to you shortly.

23 Down to no retaliation, please.

24 HSBC recognizes the importance of providing a safe
25 environment for individuals to report incidents of possible

GCETPIC4

Summation - Mr. Hubbard

1 unlawful activity or violations of company policy. The company
2 strictly prohibits all forms of retaliation against an
3 individual who in good faith reports any such incident to the
4 company.

5 Did he report it in good faith? Counsel says no.
6 Take a look at it. Maybe he was manipulating something or he
7 was trying to be opportunistic. What did Mr. Pizzimbono, their
8 own employee, their own manager, the boss say when he wrote it,
9 when he came into this courtroom?

10 He obviously, when he complimented him about his
11 courageous integrity, didn't think he was making that report in
12 bad faith. You got to use your common sense. You don't hear
13 contradictions like that except in a courtroom where a
14 defendant is trying to avoid liability for something that is
15 wrong, and that's why they say it to you. Don't be fooled by
16 it.

17 Let's go to PX-219, please.

18 I want pause for a minute and tell the jury I know
19 this argument is coming to you in lunchtime. It always happens
20 if you're the plaintiff, you argue last. So as you saw this
21 morning Mr. Jackson argues first, so by the time you get to the
22 plaintiff's argument it's less time. So I get up here and I
23 argue while we're all sitting here wanting to get some food,
24 but we will do that shortly.

25 Let's look at this one. Did we show this one before?

GCETPIC4

Summation - Mr. Hubbard

1 I'm is not sure we did. I know I mentioned it. I don't think
2 I showed it, but if I did I'm sorry, but I know I mentioned it.
3 But other than the names below -- maybe you pulled it up,
4 Peter, I didn't see it, but can we add MP. I know I mentioned
5 it before.

6 I will take you, ladies and gentlemen, to the time in
7 late November of 2014, we heard about the review that he got,
8 the off-track review that he got, we know he was shut out of
9 the office there on December the 1st, he's standing there while
10 everyone in the building is streaming past him and the access
11 had been cut off. An email had been sent to him telling him,
12 because of his complaint about Mr. Karam, that his access was
13 being shut off. That email was like 4:50 on Friday afternoon
14 before Thanksgiving.

15 (Continued on next page)

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GCE9PIC5

Summation - Mr. Hubbard

1 MR. HUBBARD: (Continuing) The time on that e-mail is
2 that it's somewhere in the 4:50 to 5 o'clock timeframe. Okay.
3 He doesn't see it. It's Thanksgiving weekend. He comes in on
4 Monday morning and he can't get in the building. So we know
5 what happens from that point up until about December 18. He
6 has no access to their systems. He gets access to the system
7 but he's told to stay home because of this dispute with
8 Mr. Karam. He's told to work remotely going forward.

9 We come to January of 2014 -- 2015. There is a
10 meeting. Mr. Silber's group meets. There's a conference call.
11 Mr. Picarella attends the conference call. I believe the date
12 is the 13th. You'll get that from the records. But there is
13 a conference call that Mr. Picarella and 20 -- 20 or so other
14 executives attend that call either in person or on the
15 telephone. And the next day there is a call to Mr. Silber from
16 a reporter who obviously was not in the meeting. Mr. Silber
17 says what's going on. There must be a leak about this meeting.
18 He goes down and he reports it. The next day Mr. Picarella, no
19 evidence of any kind that he had spoken to a single person then
20 or any time. He gets a letter from the bank's lawyer. We'll
21 see in a minute. That was Ms. Roskell's deposition, Exhibit
22 No. 1. It's 244, Peter.

23 Remember, he's working remotely. Now, I write to
24 inform you that HSBC has placed Mr. Picarella on paid
25 administrative leave immediately. We have reason to believe

GCE9PIC5

Summation - Mr. Hubbard

1 that he has conveyed confidential and potentially privileged
2 HSBC information to one or more third parties not entitled to
3 hold such information, in violation of HSBC's policies and the
4 terms of his employment. His access to the systems and
5 premises has been suspended.

6 So there we are on January 15. He never regains
7 access. He never regains any access to the building. He never
8 regains any access to the systems whatsoever.

9 Let me have the termination letter, Peter. Number
10 247.

11 So in this period of time from January 15 to 2015 when
12 he is supposed to continue to be failing at his job, he has no
13 BlackBerry access, no computer access, no access at all, he
14 can't do his job, but he's failing at it. Right. He gets
15 terminated. Your employment is being terminated due to your
16 significant performance issues which have been previously
17 discussed with you in addition you should know that the
18 investigation into the disclosure of internal confidential
19 discussions of the January 13, 2015 sales group meeting
20 resulted in a finding that you were highly likely the source of
21 that information either directly or indirectly.

22 Well you now know what I know. Because Mr. Descamps
23 told you there was no evidence of that at all. So that's not a
24 big deal. Maybe they just made a mistake. But it is a big
25 deal because the testimony you heard about it is false.

GCE9PIC5

Summation - Mr. Hubbard

1 Ms. Roskell told you that that was in the letter just to let
2 him know that the investigation had been concluded. It was
3 not. Because Ms. Roskell admitted that that was part of the
4 decision to fire him.

5 Now, I heard Mr. -- I heard counsel say no big deal.
6 No big deal that whether it was false or not. It's a huge deal
7 if he's fired for a false reason. They weren't prepared to
8 terminate this man simply on the basis of performance.
9 Ms. Roskell the head of human resources said that charge that
10 he had leaked information, treason in the financial services
11 industry, treason, that that was part of the decision.

12 Ms. Roskell, when she was testifying here, she said
13 no, even though she testified before, as I showed you that it
14 was part of the decision, when she came here she's brought in
15 here by the bank to tell you a story about it that's not true.
16 She came in here and said that was in there only because we
17 wanted to show the investigation had concluded. Yet they know,
18 as I know and you now know, that she had testified that it was
19 part of the reason he was fired. If he was fired for a false
20 reason -- any motivation -- there could be another reason. He
21 can be terminated for performance reasons. But if that false
22 reason, that lie infects that decision, it's retaliation. It
23 motivates it. If it is a motivating factor, that's
24 retaliation. There is no question about it. And you were not
25 told this morning, you were not accurately told what those

GCE9PIC5

Summation - Mr. Hubbard

1 facts show.

2 Let's talk about the -- let's talk about the lottery
3 that Mr. Picarella is here to play. When we began counsel for
4 HSBC, I could read it to you, you probably remember it. He's
5 looking for a big payday. It's a lottery for him. It's a
6 lottery ticket. Is it? A man who has a wife and four children
7 and a 25-year career on Wall Street is going to do what's right
8 and report the misconducts you heard about because he's simply
9 looking to find some way of scamming HSBC.

10 To call his claims here under federal and state law a
11 lottery is demeaning to this courtroom, to him, and everybody
12 involved in it. There is no lottery here. We think this man
13 decided he was going to vet his career and the support of his
14 family on a lottery ticket. There are no lottery tickets in
15 this courtroom and I don't want you to return any lottery
16 verdict. What I want you to do when you sit and talk about
17 this, if you find that this bank retaliated against him when
18 they passed over him, when they gave him these bad reviews,
19 when all these disparaging comments were made about him, if you
20 find he was retaliated against, what I want you to do is not
21 send him any profit. I don't want to have any lottery. I
22 don't want to show any greed. I want you to make him whole.
23 That's all I want you to do. Just fix the damage that was
24 done.

25 Mockery. I heard it again this morning, that his

GCE9PIC5

Summation - Mr. Hubbard

1 claim is a mockery. His claims were in writing. He didn't
2 make up something. He didn't circulate these allegations by
3 innuendo. He didn't go to the newspaper to make these
4 allegations.

5 What's a mockery, what's a mockery is to argue that
6 these claims are not made in good faith when they were exposed
7 and it put his job and his career at risk. Look what happened.
8 He got a root canal from the time he started these complaints
9 until today. He sat there on cross-examination, answered the
10 questions. Not easily. But he answered the questions. He sat
11 here and listened to these arguments about how greedy he is.

12 Greed is something you're not entitled to. There is
13 no evidence in this case of any greed from this man.

14 Is there any evidence from this man that he was lazy?
15 Can you imagine coming into this courtroom after hearing
16 Mr. Mullen say that he was not lazy, that he was one of the
17 hardest working people in the office, and called him this man
18 lazy. You know how we live here in this metropolitan area. We
19 take trains to work and we leave before dawn and we go home,
20 it's still dark. This man did it for 23 years. He did it
21 successfully.

22 When HSBC went out to fill this role they didn't hire
23 some chump change to take this job to succeed Hedges. They
24 went out and searched in this city, the biggest financial
25 market in the world, for somebody to succeed Eileen Hedges.

GCE9PIC5

Summation - Mr. Hubbard

1 They didn't hire somebody they thought was lazy.

2 So he gets on the train in the morning. He comes to
3 work. And until his job was destroyed he stayed late, he
4 worked hard. He -- as Mr. Mullen said, pushed forward many,
5 many ideas and good things.

6 So let's go to one of the other issues we talked about
7 and that is these performance reviews.

8 May I see them, please, Peter.

9 Ladies and gentlemen, I'm going to just run through
10 these with you real quickly. You'll see them in evidence.
11 This is the first review in the summer of '11. He's only been
12 there a few months. This is Ms. Weiss, three strong.

13 Let's go to the next one. That's August of '11.
14 Let's go to December of '11, the year end '11. Ms. Hedges.
15 Three strong.

16 The first one, I'm sorry, was by Ms. Hedges. The
17 second one here is by Ms. Hedges also. Three strong. That's
18 two.

19 Go to the next one, please, Peter. For the first half
20 of 2012. Three strong. Three poor. Three no good. Three
21 failure.

22 Next one, please. This is number four. This is in
23 May of 2013 by Ms. White. Three strong.

24 The next one, please. Mr. Karam. Three strong.

25 The next one, please. Three strong.

GCE9PIC5

Summation - Mr. Hubbard

1 Six in a row. And this main is a failure.

2 Now, you can let them rewrite history but you
3 shouldn't.

4 You've seen some e-mails here, some chats. People are
5 disagreeing. People are writing sometime a caustic e-mail or a
6 chat here. You saw about ten e-mails and chats that they
7 pulled up that they thought that Mr. Picarella should be
8 criticized for.

9 How many e-mails and chats did he write or receive in
10 the four years that he was at HSBC? Think about it. Ten
11 thousand. You can all do the math. You all use e-mail. You
12 all know how rampant it is, when you get home tonight how many
13 e-mails you'll have from your office, how many e-mails you'll
14 have. Ten thousand. And he -- they walk in this courtroom and
15 they show you five. In an investment bank do you think that
16 anybody ever has an argument or a disagreement? But if you
17 look at Mr. Picarella's e-mails you'll see that almost every
18 time he writes back and he says thank you very much, he
19 communicates in a positive way and polite way. Just pulls out
20 the ones that now that we're in the courtroom that they think
21 show some kind of lack of collegiality, as counsel said.

22 I want to go back and remind you. I missed it for a
23 minute. I want to go back and remind you, consistent with what
24 you heard today, what was said to you at the beginning of this
25 case. He viewed his complaints taking advantage of another

GCE9PIC5

Summation - Mr. Hubbard

1 person's misfortune as a way to get a lottery ticket and
2 perhaps a jackpot from this jury. I'm not going to ask you for
3 any jackpot or any lottery ticket. All I'm asking you to do
4 under these instructions you see is to award Mr. Picarella
5 fair, reasonable, make-whole compensation. That's all.

6 Let's talk a minute, if we can, about what you're
7 going to -- well let me do one thing first before we do that.

8 Let me have the verdict form, please. I'm getting
9 close to the end. And we're all getting hungry.

10 Can we have the verdict form please, Peter

11 THE COURT: Let's not put the verdict form up on the
12 screen.

13 MR. HUBBARD: I thought we --

14 THE COURT: Hold on. We're not going to put that up
15 on the screen. Go ahead, counsel.

16 MR. HUBBARD: But I can talk about it?

17 THE COURT: Yes. You can talk about it.

18 MR. HUBBARD: You will receive something like this.
19 It's a piece of paper. It's called verdict form and it has
20 questions and places for you to answer it. And the first
21 section is under Title VII of the Civil Rights Act, that's the
22 federal claim, and the second section is the section under the
23 New York City Human Rights Law. Many of the questions are the
24 same. Some are not. That causation question, that but for
25 versus motivating factor section is different. But under each

GCE9PIC5

Summation - Mr. Hubbard

1 one there's a question to you whether he engaged -- do you find
2 by a preponderance of the evidence -- remember that's the
3 burden we have, to prove preponderance of the evidence -- do
4 you find that he engaged in protected activity under the Title
5 VII or under the New York City Human Rights Law?

6 Well, we know he engaged in protected activity when he
7 filed his EEOC claim. The judge will tell you that. We know
8 he engaged in protected activity when he filed this case in the
9 summer of 2014 before he was fired in 2015. That's two
10 examples right off the bat of protected activity.

11 As we go through, we've seen all these negative
12 reviews, we saw the fact that he was passed over, we saw all of
13 the other samples we say. And so we know that preceding that
14 adverse -- those adverse actions that they followed. We know
15 that this protected activity, including his internal
16 complaints, including his internal complaints began in the
17 spring of 2012 and as you saw continued through the termination
18 of his employment.

19 Did the defendant know that he was making these sexual
20 harassment complaints? I did not hear this morning I did not
21 hear -- I could have missed it but I don't believe I heard
22 counsel say that HSBC was not aware of these claims. I don't
23 think they did. But I want to make sure that I remind you that
24 HSBC was aware of his sexual harassment complaints at the
25 highest level.

GCE9PIC5

Summation - Mr. Hubbard

1 This is Ms. Bilbrey. Were there a member of senior
2 management who you along with employment counsel reported to
3 about the investigations related to Mr. Picarella? This is the
4 head of human resources. She goes on. She says: His direct
5 supervisor at that time forward to the end of the period, Mike
6 Karam, and there was a more senior individual by the name of
7 Didier Descamps that we eventually had conversations with. How
8 about Suzanne White? She was a person. She says, answer:
9 Suzy White, yes. I go on and I say: From time to time had she
10 had been a person who you would discuss his complaints with?
11 Answer: Yes. And Mr. Pizzimbono? And Pablo Pizzimbono, yes.

12 There is no debate. We say under this evidence that
13 the defendant -- and you'll see from the instruction that all
14 you have to find is that HSBC as an institution was aware that
15 he had engaged in this protected activity.

16 Has plaintiff proved by a preponderance of the
17 evidence that the defendant took an adverse employment action
18 against him? Well, we've just talked about -- we've just
19 talked about him being passed over. We've talked about the
20 negative review that he received that resulted in part in his
21 termination. And, obviously, the termination of his employment
22 is an adverse employment action.

23 Under Title VII, the federal statute, the causation
24 question is whether or not -- if I can find it -- is whether or
25 not the defendant took the adverse employment action because of

GCE9PIC5

Summation - Mr. Hubbard

1 his protected activity. Cause and effect relationship. You'll
2 be asked to make that determination.

3 Under the city statute, it's quite different under the
4 city statute. Has the plaintiff proved by a preponderance of
5 the evidence that defendant's desire to retaliate against the
6 plaintiff for engaging in protected activity was a motivating
7 factor in the defendant's decision to take the adverse
8 employment action in violation of the New York City Human
9 Rights Law? It does not need to be the sole reason. It does
10 not have to be the sole reason. It can be part. There can be
11 other reasons that precipitate those decisions.

12 And then -- so that's a different test under the city
13 statute. And then when you finish with that you will come to a
14 section in the verdict form that relates to damages. And there
15 are different sections. One is back pay. Back pay is what
16 he's lost in terms of his earnings from the date he was fired
17 until the date of your verdict. And that's about 21 months.
18 We'll talk about that in a minute. Front pay is the, the Court
19 will give you the instruction, but it's what he could
20 reasonably have been expected to earn until you find from
21 today, from the date of your verdict, until you find that he's
22 likely to be re-employed in a comparable job. That's going to
23 require you to look forward a little bit into the future.

24 You saw me give Mr. Picarella those notebooks that
25 were this thick. That's not something he got at the supply

GCE9PIC5

Summation - Mr. Hubbard

1 store downstairs and filled out. There are documents that were
2 provided though this court in discovery in this case, asked for
3 by the defendant. Send us every document you used to look for
4 a job. They made fun of it.

5 Imagine getting notes. Those notebooks are nothing
6 but pain. There's a man at the kitchen table at home telling
7 his wife and family he's been terminated.

8 MR. JACKSON: Objection.

9 THE COURT: Sustained. Move on.

10 MR. HUBBARD: Those documents reflect the -- those
11 documents reflect the difficulty in this city of finding a job
12 when you've been terminated and you go and tell the people you
13 interview with, if they interview you, that you were fired.
14 You can't make fun of the fact that he's sitting there looking
15 for a job through all of this time as he told you he was.

16 Let's talk about how you go about awarding damages.
17 If you decide -- if you decide that the defendant has
18 retaliated against him and you answer these questions yes, you
19 will be asked if he has proven that he's entitled to back pay
20 and, if so, how much do you award.

21 How do you figure out back pay? You can use one of
22 two things. You could use 21 months of his annual compensation
23 while he was at HSBC which I think we know is about \$280,000.
24 It was \$225,000 in base salary and I think if I get it right
25 maybe \$55,000 bonus. I think the total of his compensation at

GCE9PIC5

Summation - Mr. Hubbard

1 HSBC -- maybe it was more in the first year but the remaining
2 years was \$280,000. So if you take that 21 months you can
3 figure out what that lost pay without any increase, the same
4 rate, would be. And it comes out to about \$500,000 in back pay
5 if you decide to award back pay.

6 Front pay, in the front pay category again you have to
7 decide how long you think he is likely to be -- lose his
8 earning capacity and be unemployed as a result of this
9 termination. You may decide it's two years. You may look at
10 the difficulty he's had in finding a job. You may decide it's
11 going to be three years. You may decide it's one year. You
12 may decide it's five years. You may decide that he's been --
13 his career has been significantly damaged for the long-term.
14 What you would do there is you would then decide how many years
15 you think it's going to take until he can restore that earning
16 capacity and what amount of money you believe should be awarded
17 for each year in terms of his loss of earning capacity. Is it
18 the two hundred thousand -- \$280,000 that he was paid at HSBC
19 or is it the \$400,000 that was being paid to the head of
20 business development, the job that he was hired to take.
21 You'll have to decide which number to apply. If you decide to
22 award him front pay you'll have to decide what the loss of
23 earning capacity is. And you have some options there to
24 discuss.

25 The next element is if you prove that he's entitled to

GCE9PIC5

Summation - Mr. Hubbard

1 damages is whether or not he's entitled to damages for pain,
2 suffering, humiliation, mental anguish or reputational harm. I
3 won't spend much time on this. But when you get to this think
4 to yourself what harm has been done to his earning capacity in
5 future years because of what happened to him at HSBC based upon
6 conduct that was wrong, the retaliation that I've mentioned to
7 you.

8 The last question on this form is a question that asks
9 you to consider an award of punitive damages. The Court will
10 instruct you on what punitive damages means. Punitive damages
11 are exemplary damages. They are damages designed to set an
12 example, so that deter future conduct, to deter future
13 instances in which someone would decide to retaliate against
14 someone because they have followed the law and they have
15 reported violations of the law to their employer.

16 The instruction will tell you that it must be
17 accompanied by ill will or spite. And that will be up to you
18 to determine if you believe that the retaliation he suffered,
19 giving a false reason for firing him, these e-mails you see,
20 marginalize him, he's a problem, can we get -- can we put him
21 on the list. Do those things reflect ill will and spite? You
22 decide.

23 If you decide to award him punitive damages, there is
24 no magic number. The instruction will lead you to the obvious
25 way to do it. The law requires that punitive damages award

GCE9PIC5

1 to -- punitive damages awards bear a reasonable relationship to
2 the compensatory award you return; not some number picked out
3 of the sky; not some number that bears no relationship to the
4 harm, but a very reasonable relationship in a multiple of what
5 the compensatory damages are. You'll be able to figure out
6 that from the -- may I just have a moment please, your Honor.

7 Ladies and gentlemen, thank you for your attention and
8 your patience and we look forward to your deliberations. Thank
9 you very much.

10 THE COURT: Okay. Let me just see counsel in the
11 robing room just for a moment with the court reporter.

12 (Continued on next page)

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GCE9PIC5

1 (In the robing room)

2 THE COURT: Do counsel need to raise anything before
3 we send this jury to lunch?

4 MR. JACKSON: There are a couple of issues, your
5 Honor, that we want to put on the record and at least one I
6 think I'm going to ask for some relief from.

7 The first one is Mr. Hubbard told the Court that he
8 was not going to raise any claim of recent fabrication that
9 related to the testimony about Mr. -- about the observations of
10 Mr. Picarella not being in these conference rooms, not being
11 where he was supposed to be. And here he made what amounted to
12 a pure argument of recent fabrication saying it comes now
13 because we're in a courtroom, not a single report saying dark
14 conference rooms. The Sametime exhibits that the Court
15 sustained Mr. Hubbard's objection for go directly to that
16 recent fabrication and I was very surprised that there would be
17 such a clear argument of recent fabrication in spite of what
18 was --

19 MR. HUBBARD: May I address that?

20 THE COURT: No. Go ahead.

21 MR. JACKSON: Second, your Honor. There is -- we have
22 an objection to Mr. Hubbard's statement that the filing of --
23 filing the lawsuit is protected activity.

24 THE COURT: I guess my first question is do you want
25 me to do anything -- are you asking me to do anything about

GCE9PIC5

1 this now or should I send the jury to lunch? Are you asking me
2 to do something before the jury has lunch?

3 MR. JACKSON: Your Honor, the only thing -- the only
4 thing that we would ask with regard to -- with any of our
5 objections, the only one is just the first one; that we could
6 do it after lunch, but we would ask to just display at least
7 one of those messages to show that this is not a recent
8 fabrication.

9 THE COURT: But we can deal with that -- I can let
10 this jury go grab lunch real quick?

11 MR. JACKSON: Absolutely, Judge.

12 THE COURT: Let's do that. Let's do that and then
13 we'll deal with the next one. I plan on giving the jurors
14 about 35 minutes for lunch. Is that enough time? Forty
15 minutes?

16 MR. JACKSON: That's fine.

17 MR. HUBBARD: That's fine.

18 (Continued on next page)

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1 (In open court)

2 THE COURT: So, Members of the Jury, we're going to
3 give you your lunch break now. Don't discuss the case amongst
4 yourselves or with anyone else. After lunch I will give you
5 the instructions on the law and then you can begin to
6 deliberate. So I will give you a 40-minute lunch break. In
7 the meantime don't discuss the case with anyone else or amongst
8 yourselves. See you in 40 minutes. Thank you.

9 (Jury excused)

10 (Continued on next page)

GCE9PIC5

1 (In open court)

2 THE COURT: Defense counsel, you may continue.

3 MR. JACKSON: Thank you, your Honor. So I think we
4 made our objection regarding the recent fabrication.

5 We had an objection regarding the argument that filing
6 the lawsuit constituted a protected activity. The Court has
7 clearly already defined what the protected activity is. That
8 was the subject of our discussion at the charge conference and
9 subsequently. So we think a curative instruction of some kind
10 is appropriate with regard to that.

11 There is also -- there was also an exhibit that was
12 displayed that I believe is not in evidence which is PX-302.
13 If I could be -- if we could confirm that. We'd just like to
14 just have the Court -- I don't think that that's -- that's not
15 one of our major issues but we think it should be clarified to
16 the jury that PX-302 is not in evidence.

17 I believe that's all of our issues, your Honor.

18 I'm sorry, your Honor. There's one other thing which
19 is the damages arguments that were made by plaintiff's counsel
20 were a violation of the stipulation that we discussed with the
21 court. There were a number of arguments made that related --
22 that were just in violation. I mean there was an argument
23 about he should be entitled to his bonus. He should be
24 entitled to \$400,000 which was a salary that he would have
25 gotten if he had gotten a particular raise. That's flatly in

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1 conflict with what we stipulated to. And it's also not
2 supported by the evidence, your Honor. There is no evidence
3 that that was a salary that Mr. Picarella was ever entitled to.

4 THE COURT: So what are you asking me to do, if
5 anything?

6 MR. JACKSON: With regard to --

7 MR. HUBBARD: May I respond?

8 THE COURT: You probably shouldn't to this first one.
9 Go ahead.

10 MR. JACKSON: With regard to the recent fabrication
11 argument, as we said we'd ask the Court to admit one of the
12 documents just to respond to the recent fabrication.

13 With regard to the protected activity, just a curative
14 instruction just to clarify that, your Honor.

15 With regard to the damages issue, this one is a little
16 bit difficult because the Court has suggested -- has indicated
17 that it would use special interrogatories but I think it would
18 be appropriate to say that there is no evidence in the record
19 that is connected to any potential raise that Mr. Picarella
20 claims he is entitled to and that shouldn't be a part of their
21 considerations.

22 THE COURT: As to that one that objection is
23 overruled. Plaintiff's counsel's argument regarding the lack
24 of documentation I believe was confined to the lack of any
25 documentation from any manager of Mr. Picarella. Those

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1 Sametime Chats are not Mr. Picarella's managers so that
2 objection is overruled.

3 The third one, again, I'm going to -- we'll wait and
4 see what the jury does and we'll deal with that if we need to.

5 As to the second one, it does seem that perhaps a
6 curative instruction is appropriate. But let me hear
7 plaintiff's counsel on that, number two.

8 You certainly did indicate as you were going down the
9 verdict sheet that the filing of this lawsuit is a protected
10 activity and that's not in this case as a protected activity.

11 MR. HUBBARD: Well, Mr. Bortnick reminds me that your
12 Honor's instruction only says that the EEOC charge was
13 protected activity. But I believe the law is.

14 THE COURT: And the reporting of the sexual harassment
15 of the female coworker.

16 MR. HUBBARD: Yes. Yes. Yes. But I guess my point
17 is, and I'm sorry if I misspoke, but I don't think I said that
18 your Honor is going to say that it's protected activity. I
19 think I said that it was protected activity. And I don't think
20 that's an incorrect statement of the law. We can get the
21 transcript. But I don't think that's an incorrect statement of
22 the law at all.

23 THE COURT: It's not a question of whether or not
24 that's a correct statement of the law. It's a question of
25 whether or not that's in this case. It's not in this case.

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1 You didn't put it in the amended complaint. It's not one of
2 the allegations in this case.

3 It seems that a curative instruction is appropriate
4 since you made this statement that this constitutes protected
5 activity, the filing of this lawsuit. Even though my
6 instructions to the jury will not mention that, it certainly
7 might be appropriate to at some point let the jury know that
8 that's not protected activity that's covered in this case.
9 That's not a statement that that can never be protected
10 activity, that's not the case, but that's certainly not in this
11 case.

12 Anything further from plaintiff on that?

13 MR. HUBBARD: Your Honor, obviously I believed that
14 there was testimony in the case about the filing of the lawsuit
15 and when that took place. If I'm wrong, I'm wrong.

16 THE COURT: That's all fine. I mean that has come
17 into this case. What I'm saying is we talked about at length
18 yesterday is that that's not one of the claims in this case.
19 That wasn't contained in the second amended complaint and
20 that's not one of the claims here. So the fact that that
21 evidence has come in I think it's misleading to then say to the
22 jury that that is protected activity in this case.

23 So it's not a question of whether or not the
24 evidence -- there's evidence about that. The issue is that
25 this wasn't one of the claims in this case. It could have been

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1 but it wasn't.

2 MR. HUBBARD: Well I defer to your Honor. I don't
3 have the complaint in front of me. I accept what your Honor
4 says.

5 THE COURT: Well we did have a lengthy discussion
6 about this yesterday. Your objection to my jury instructions
7 last night was to the fact that I did not include the filing of
8 the EEOC charge. It were those two protected activities.
9 That's what we talked about yesterday. And complaints about
10 the sexual harassment of a female coworker, and the filing of
11 the EEOC charge.

12 MR. HUBBARD: I understand.

13 THE COURT: Okay.

14 Does defense counsel have any suggested language for a
15 curative instruction? What do you want me to say?

16 MR. JACKSON: Just your Honor that you heard argument
17 related -- you heard argument that there was -- that the filing
18 of this lawsuit was protected activity. The filing of this
19 lawsuit is not included in any of the protected activity that
20 you should consider in this case so you should disregard that.

21 THE COURT: That seems a little vague. That seems a
22 little too broad.

23 MR. HUBBARD: I would be okay if your Honor said that
24 it was not a protected activity asserted by the plaintiff in
25 this case. That would seem to be consistent with what your

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1 Honor was saying.

2 MR. JACKSON: I'm fine with "asserted by" your Honor.

3 THE COURT: So the language that counsel agreed to is,
4 "The filing of this lawsuit is not a protected activity
5 asserted by the plaintiff in this case."

6 MR. HUBBARD: Mr. Bortnick wants me to ask you to add
7 to that that the -- as you have in your instruction, that
8 the -- that the plaintiff does assert that the filing of the
9 EEOC charge was a protected activity but I know that that's
10 already --

11 THE COURT: That's already in the instructions.

12 Is there anything else -- do we have the updated jury
13 instructions?

14 So counsel should have the last version of the jury
15 instructions and the verdict form. I'll let counsel grab some
16 lunch if you want to and we'll come back at -- let's come back
17 at 2 o'clock just in case there's some other issues and then
18 when the jury gets back here at 2:15 I plan to give them the
19 instructions on the law and let them start deliberating.
20 Anything else from either side?

21 MR. JACKSON: No. Thank you, Judge.

22 MR. HUBBARD: Thank you, your Honor.

23 (Luncheon recess)
24
25

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AFTERNOON SESSION

(2:10 p.m.)

THE COURT: Counsel, one thing I noticed that I need to edit in the instructions -- are there any kind of typographical errors?

What I noticed is on page 39 it says -- both counsel didn't agree, I should strike the sentence that says: In aid of your recollection, all of the exhibits admitted into evidence will given be given to you at the start of your deliberations. I will strike that sentence if that's not happening.

MR. BORTNICK: Right, because your Honor said you wouldn't do that.

THE COURT: Is there anything else?

MR. JACKSON: No, your Honor.

MR. BORTNICK: Perhaps, your Honor -- it may be in here somewhere -- if the jury wants to see any of the exhibits that they should be told that of course they will be provided to them during the deliberations. I just don't want them to think that they get only what's seen in the courtroom and then relying on their notes.

Maybe it would be done right there.

THE COURT: Maybe what I should do is add that next sentence: Additionally, if any of you wishes to have witness testimony or exhibits provided, you may request that.

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1 MR. BORTNICK: Thank you.

2 MR. JACKSON: Your Honor, is it the Court's practice
3 to have the jury come back for readbacks or to send transcripts
4 back to the jury if they request?

5 THE COURT: Depends on how long it is. My preferred
6 practice is to send the transcript in so we don't have to tax
7 the court reporter's vocal cords. But if it's quick, I will
8 defer to the parties. But with the length of testimony in this
9 case, it's probably most efficient to send in the portion of
10 the transcript.

11 MR. JACKSON: So we prepared redacted transcripts of
12 all of the witnesses that we redacted the colloquy and all
13 objections sustained, so if that occurs we'll --

14 THE COURT: Obviously, counsel, what will happen is if
15 we get a note and jurors request anything, we'll share that
16 note with counsel and counsel can decide what they want to to.
17 Counsel can confer, should confer, and we'll take it up then.

18 MR. JACKSON: Thank you, Judge.

19 THE COURT: Anything else? I will make those
20 additions, those changes on page 39.

21 There may be other things as we --

22 MR. BORTNICK: 39, your Honor?

23 THE COURT: Yes, page 39.

24 It seems to me that also on page 39, first sentence of
25 the next paragraph, if any juror wishes to have testimony or

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1 exhibits provided, we should add --

2 MR. BORTNICK: Right.

3 THE COURT: -- simply send me a written note through
4 your foreperson.

5 Any objection to that by either side?

6 MR. BORTNICK: No.

7 MR. JACKSON: No, your Honor.

8 THE COURT: Both sides have seen the verdict form. I
9 think everything there is clear. If so, let's go ahead and
10 we'll hand -- after I instruct the jury, we will give
11 counsel -- Hold on a second.

12 (Pause)

13 THE COURT: We will hand counsel this verdict form.
14 Let's have both counsel look at this and make sure this is the
15 proper version, then we will mark that as Court Exhibit 2 and
16 the instructions as Court Exhibit 1 and we'll hand it to
17 counsel. It should be the same version as what you have.

18 MR. BORTNICK: This appears to be in accord with what
19 your Honor gave us earlier.

20 THE COURT: Share it with defense counsel.

21 When the jury comes out I will give the curative
22 instruction that we discussed and I will read the jury
23 instructions to the jury. Afterwards I will meet with counsel
24 in the robing room briefly to make sure there were no mistakes
25 in my reading the jury instructions, and I will send the jury

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1 in to start their deliberations. Once we made any adjustments
2 to the typographical errors in the jury instruction we will
3 send a copy in to the jury, giving counsel obviously an
4 opportunity to review it before it goes to the jury.

5 Everyone good with that?

6 MR. HUBBARD: Yes, your Honor.

7 MR. JACKSON: Yes, your Honor.

8 THE COURT: When the jury is ready, we'll get going.

9 MR. BORTNICK: I notice on the verdict form, I think
10 we're short one signature line. Don't we have nine jurors?
11 There are eight lines.

12 THE COURT: Okay.

13 MR. BORTNICK: Just noticed.

14 THE COURT: All right.

15 MR. BORTNICK: It's the kind of thing you never really
16 look at.

17 THE COURT: You're correct, we need another signature
18 line. We'll make that change and share it with counsel.

19 So counsel are aware, I will give the jury a written
20 copy of the instructions. For efficiency's sake, I do not plan
21 on reading all of the captions or any of the captions in the
22 jury instructions until we get to the section regarding the
23 elements and the damages, because that helps things flow better
24 if I read the captions. But other than that, I plan on
25 skipping the captions.

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Charge

1 Does anyone have an objection to that?

2 MR. HUBBARD: No, your Honor.

3 MR. JACKSON: No, your Honor.

4 THE COURT: Okay.

5 MR. BORTNICK: Your Honor, I noticed something in the
6 jury charge, page 30, the third element of Mr. Picarella's city
7 law claims, second to last sentence of the first paragraph
8 there, the fourth element.

9 THE COURT: Okay.

10 MR. BORTNICK: Mr. Picarella contends that HSBC took
11 action against him because he protested sexual harassment.

12 THE COURT: Hold on. Okay, second to last. Go ahead.

13 MR. BORTNICK: Where it says Mr. Picarella contends
14 that HSBC took action against him because he protested sexual
15 harassment, and but we also had the issue of the EEOC charge
16 that is also part of this case.

17 THE COURT: Okay. It seems to me to make sense to
18 add -- what language do you suggest?

19 MR. BORTNICK: Because of -- because either he
20 protested sexual harassment or filed an EEOC charge.

21 MR. HUBBARD: Say including his EEOC charge.

22 THE COURT: No, that's different.

23 MR. JACKSON: I actually think including is more
24 appropriate.

25 THE COURT: Okay.

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Charge

1 MR. HUBBARD: Including his EEOC charge.

2 THE COURT: That's what you want?

3 MR. HUBBARD: That's what I would do, but I defer.

4 MR. BORTNICK: It's or, because they're separate. We
5 talked about that earlier. It's one or the other.

6 THE COURT: Or is the more correct statement of the
7 claims in this case.

8 Anything else from defense counsel on that?

9 MR. BORTNICK: No, I noticed that.

10 MR. JACKSON: We defer to the Court, your Honor.

11 THE COURT: Counsel, we have added another line. Go
12 ahead and look at it and see if we're good. This is the
13 verdict sheet.

14 Let's bring the jury in.

15 (Jury present)

16 THE COURT: Welcome back.

17 I'm going to give you the instructions on the law, but
18 before I do that I need to give you another brief instruction,
19 that the filing of this lawsuit is not a protected activity
20 asserted by the plaintiff in this case.

21 I am now going to instruct you on the law. It is
22 important that you listen to my instructions, but you do not
23 need to write them down because I am going to give you a
24 written copy of the instructions when you go to deliberate.

25 You have now heard all of the evidence in this case.

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Charge

1 At this point, it is my duty to instruct you on the law that
2 will govern your deliberations.

3 As I told you at the start of this case, it is your
4 duty to accept my instructions of law and apply them to facts
5 as you determine them. You must follow the law as I give it to
6 you, regardless of any opinion you may have about what the law
7 may be or ought to be. If any attorney states a legal
8 principle different from any that I state to you in my
9 instructions, it is my instructions that you must follow. You
10 should not single out any instruction, or any word or phrase in
11 an instruction, as alone stating the law, you should consider
12 the instructions as a whole.

13 As I have said, your role is to decide the fact issues
14 in this case. You, the members of the jury, are the sole and
15 exclusive judges of the facts. You determine the weight of the
16 evidence. You appraise the credibility of the witnesses. You
17 resolve such conflicts as there may be in the testimony. You
18 draw whatever reasonable inferences you decide to draw from the
19 evidence or lack of evidence.

20 Let me also check in with the jury. Testing one, two,
21 three. Can everyone hear me?

22 I'll continue.

23 In determining facts, you should rely on your
24 recollection of the evidence. What the lawyers have said the
25 evidence shows in their opening statements, objections or

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Charge

1 questions, or may say in their closing arguments, is not
2 evidence. Nor is anything I may have said during the trial or
3 may say during these instructions to be taken as evidence. If
4 there is any difference or contradiction between what any
5 lawyer has said and what you decide the evidence has shown, or
6 between anything I may have said and what you decide the
7 evidence has shown, please be mindful that it is your view of
8 the evidence only that controls.

9 You are to perform your duty of finding the facts in
10 this case in an atmosphere of complete fairness and
11 impartiality without bias, prejudice, or sympathy toward any
12 party. All parties stand as equals before the bar of justice.
13 You are to deliberate coolly and calmly, considering and
14 weighing the evidence without emotion or regard to the reaction
15 of the parties or the public may have to your verdict.

16 It is the duty of the attorney for each side of a case
17 to object when the other side offers testimony or other
18 evidence that the attorney believes is not properly admissible.
19 An attorney has the right and duty to ask the Court to make
20 rulings of law and to request conferences at the sidebar out of
21 the hearing the jury. All such questions of law must be
22 decided by me. You should not show any prejudice against any
23 attorney or party because an attorney objected to the
24 admissibility of evidence, asked for a conference out of the
25 hearing of the jury, or asked me for a ruling on the law.

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Charge

1 Whether offered evidence is admissible is purely a
2 question of law and the province of the Court and outside the
3 province of the jury. In admitting evidence to which the
4 objection has been made, the Court does not determine what
5 weight should be given to such evidence, nor does it pass on
6 the credibility of the evidence. Of course, you will dismiss
7 from your mind completely any evidence which has been ruled out
8 of the case by the Court, and you will refrain from speculation
9 or conjecture or any guesswork about the nature or effect of
10 any colloquy between the Court and counsel held out of your
11 hearing or sight.

12 I also ask you to draw no inference from my rulings or
13 from the fact that, on occasion, I may have asked questions of
14 certain witnesses. My rulings were no more than applications
15 of the law and my questions, if any, were only intended for
16 clarification or to expedite matters.

17 I have no opinion concerning the verdict you should
18 render in this case.

19 In this case, defendant HSBC is a corporation. The
20 mere fact that one of the parties is a cooperation does not
21 mean that it is entitled to any lesser consideration by you.
22 All litigants are equal before the law, and corporations, big
23 or small, are entitled to the same fair consideration as you
24 would give any other individual party.

25 The evidence from when you are to decide the facts in

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Charge

1 this case consists only of:

2 1. The sworn testimony of witnesses on both and
3 direct and cross-examination, regardless of who called the
4 witness;

5 2. The exhibits that were received in evidence; and

6 3. Any facts to which all the lawyers have agreed or
7 stipulated.

8 Nothing else is evidence. Not what the lawyers say,
9 not what I say, and not anything that you may have heard
10 outside the courtroom.

11 There are two types of evidence which you may use in
12 reaching your verdict, direct evidence and circumstantial
13 evidence.

14 Direct evidence is when a witness testifies about
15 something that the witness knows by virtue of his own senses,
16 something the witness has seen, touched, heard or tasted.
17 Direct evidence may also be in the form of an exhibit admitted
18 into evidence where the fact to be proven is its present
19 existence or condition.

20 Circumstantial evidence is evidence which tends to
21 prove a disputed fact by proof of other facts. For example,
22 assume that when you came into the courthouse this morning the
23 sun was shining. Assume that the courtroom blinds were drawn
24 and you could not look outside. As you were sitting here,
25 someone walked in with an umbrella which was dripping wet.

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Charge

1 Then a few minutes later another person entered with a wet
2 umbrella. Now on these facts you cannot look outside of the
3 courtroom to see whether it is raining, so you have no direct
4 evidence of that fact. But on the combination of facts that I
5 have asked you to assume, it would be reasonable and logical
6 for you to conclude that it has been raining. That is all
7 there is to circumstantial evidence. Using your reason,
8 experience and common sense, you infer, from established facts,
9 the existence or non-existence of some other fact.

10 The law makes no distinction between district and
11 circumstantial evidence. Circumstantial evidence is of no less
12 value than direct evidence. You can consider either or both
13 and give them as much or little weight as you deem warranted.

14 In their closing arguments the attorneys may ask you
15 to infer from one or more facts the existence of some other
16 fact.

17 An inference is not a suspicion or a guess. It is a
18 logical conclusion that you, the jury, are permitted to draw --
19 but not required to draw -- from the facts that have been
20 established by either direct or circumstantial evidence using
21 your reason, experience and common sense.

22 There are times when different inferences may be drawn
23 from facts, whether proved by direct or circumstantial
24 evidence. The plaintiffs may ask you to draw one set of
25 inferences, while the defendants may ask you to draw another.

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Charge

1 It is for you, and you alone, to decide what inferences, if
2 any, you will draw.

3 A question put to a witness is not evidence. Only a
4 witness's answers are evidence. However, you may not consider
5 any answer that I directed you to disregard or struck from the
6 record or to which I sustained an objection.

7 At times a statement may have been incorporated into a
8 question which assumed certain facts to be true, and a witness
9 may have been asked if the statement was true. If the witness
10 denied the truth of a statement, and if there is no evidence in
11 the record proving that assumed fact to be true, then you may
12 not consider it to be true simply because it was contained in
13 the question posed to the witness.

14 Similarly, if a hypothetical question was asked based
15 upon certain assumed facts, it is for you to determine, based
16 on the evidence in the case, whether those assumed facts are
17 true. You may not consider them to be true simply because they
18 were contained in a question posed to a witness.

19 You have had the opportunity to observe or hear from
20 the witnesses. It is now your job to decide how believable
21 each witness was in his testimony. You are the sole judges of
22 the credibility of each witness and the importance of each
23 witness's testimony.

24 How do you determine where the truth rests? You
25 should use all the tests for truthfulness that you would use in

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Charge

1 determining matters of importance to you in your everyday life.
2 You should consider any bias or hostility the witness may have
3 shown for or against any party, as well as any interest the
4 witness has in the outcome of the case. It is your duty to
5 consider whether the witness has permitted any such bias or
6 hostility to color his testimony.

7 You should consider: 1, the opportunity the witness
8 had to see, hear and know the things about which he testified,
9 2, the accuracy of the witness's memory, 3, the witness's
10 candor or lack of candor, 4, the witness's intelligence, 5, the
11 reasonableness and probability of the witness's testimony, and
12 6, the consistency and corroboration of the witness's testimony
13 with other believable testimony.

14 You watched each witness testify. Everything a
15 witness said or did on the witness stand counts in your
16 determination. Often it is not what a witness says but how the
17 witness says it that counts. How did witness impress you? Did
18 the witness appear to be frank, forthright and candid, or
19 evasive and edgy, as if hiding something? What was the
20 witness's demeanor? What was the witness's behavior, bearing,
21 manner and appearance while testifying? These are examples of
22 the kinds of common sense questions you should ask yourselves
23 in deciding whether a witness is truthful.

24 In other words, what you must try to do in deciding
25 credibility is to size a witness up in light of the witness's

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1 demeanor, the explanations given, and all the other evidence in
2 the case. Always remember that you should use your common
3 sense, your good judgment, and your own life experience in
4 determining witness credibility.

5 In deciding whether to believe a witness, keep in mind
6 that people sometimes forget things. You need to consider,
7 therefore, whether the witness's testimony reflects an innocent
8 lapse of memory or an intentional falsehood, and that may
9 depend on whether it has to do with an important fact or with
10 only a small detail.

11 If you find that any witness has testified falsely as
12 to any material fact, that is, as to any important matter, the
13 law permits you to disregard completely the entire testimony of
14 that witness upon the principle that one who testifies falsely
15 about one material fact is likely to testify falsely about
16 everything. You are not required, however, to consider such a
17 witness as totally unbelievable. You may accept so much of his
18 testimony as you deem true and disregard what you feel is
19 false. As the sole judges of the facts, you must decide which
20 witnesses you will believe, what portion of their testimony you
21 accept, and what weight you will give to it.

22 In evaluating the credibility of a witness, you should
23 take into account any evidence that the witness may benefit in
24 some way from the outcome of the case. Such interest in the
25 outcome creates a motive to testify falsely and may sway a

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Charge

1 witness to testify in a way that advances the witness's own
2 interest. Therefore, if you find that any witness whose
3 testimony you are considering may have an interest in the
4 outcome of this trial, then you should bear that factor in mind
5 when evaluating the credibility of his testimony.

6 Keep in mind, however, that it does not automatically
7 follow that testimony given by an interested witness is to be
8 disbelieved. There are many people who, no matter their
9 interest in the outcome of a case, would not testify falsely.
10 It is for you to decide, based upon your own perceptions and
11 common sense, to what extent, if at all, a witness's interest
12 affected his or her testimony.

13 In this case, as in any lawsuit, both the plaintiffs
14 and the defendants have an interest in the outcome of the case.

15 The weight of the evidence presented by each side does
16 not necessarily depend on the number of witnesses testifying on
17 one side or the other. You must consider all the evidence in
18 the case, and you may decide that the testimony of a smaller
19 number of witnesses on one side has a greater weight than that
20 of a larger number on the other.

21 The testimony of a single witness which produces, in
22 your minds, belief in the likelihood of truth is sufficient for
23 the proof of any fact, and would justify a verdict in
24 accordance with such testimony, even though a number of
25 witnesses may have testified to the contrary, if, after

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Charge

1 consideration of all the evidence in the case, you hold greater
2 belief in the accuracy and reliability of the one witness.

3 The test is not which side brings the greater number
4 of witnesses or presents the greater quantity of evidence, but
5 which witness and which evidence appeals to your minds as being
6 the most accurate and otherwise trustworthy.

7 Inconsistencies or discrepancies in the testimony of a
8 witness or between the testimony of different witnesses may or
9 may not cause you to discredit such testimony. Two or more
10 persons witnessing an incident or a transaction may see or hear
11 it differently. An innocent misrecollection, like failure of
12 recollection, is not an uncommon experience. In weighing the
13 effect of a discrepancy, always consider whether it pertains to
14 a matter of importance or an unimportant detail, and whether
15 the discrepancy results from innocent error or intentional
16 falsehood.

17 To constitute evidence, exhibits must be received in
18 evidence. Exhibits marked for identification but not admitted
19 are not evidence. Materials brought forth only to refresh a
20 witness's recollection are also not evidence.

21 Members of the jury, now that I have given you general
22 instructions, I am going to instruct you on the law to be
23 applied to the specific issues in this case. But first I am
24 going to explain the concept of burden of proof. The burden of
25 proof in this case is by a preponderance of the evidence.

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Charge

1 The party with the burden of proof on any given issue
2 has the burden of proving to you every disputed element of that
3 party's claim by a preponderance of evidence. If you conclude
4 that the party bearing the burden of proof has failed to
5 establish that party's claim by a preponderance of the
6 evidence, you must decide against that party on the issue you
7 are considering.

8 What does preponderance of the evidence mean? To
9 establish a fact by a preponderance of the evidence means to
10 prove that the fact is more likely true than not true. A
11 preponderance of the evidence means the greater weight of the
12 evidence. It refers to the quality and persuasiveness of the
13 evidence, not the number of witnesses or documents. In
14 determining whether a claim has been proved by a preponderance
15 of the evidence you may consider the relevant testimony of all
16 witnesses, regardless of who may have called them, and all the
17 relevant exhibits received in evidence, regardless of who may
18 have produced them.

19 This concept, preponderance of the evidence, is often
20 illustrated with the idea of scales. In considering whether
21 Mr. Picarella has met his burden of proof on his claims, you
22 put on one side all the credible evidence favoring
23 Mr. Picarella, and on the other side all the credible evidence
24 favoring HSBC. If the scale tips towards Mr. Picarella because
25 his evidence is weightier, then you must find in his favor. If

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1 the scale tips toward HSBC because its evidence is weightier,
2 then you must find in favor of HSBC.

3 If you find that the credible evidence on a given
4 issue is evenly divided between the parties, that is, equally
5 probable that one side is right as it is that the other side is
6 right, then you must decide that issue against the party having
7 this burden of proof. That is because the party bearing this
8 burden of proof must prove more than a simple equality of the
9 evidence. That party must prove the element at issue by a
10 preponderance of the evidence. On the other hand, the party
11 with this burden of proof need prove no more than a
12 preponderance. So long as you find that the scale tips,
13 however slightly, in favor of the party with this burden of
14 proof that what the party claims is more likely true than not
15 true, then that element will have been proved by a
16 preponderance of the evidence.

17 Proof beyond a reasonable doubt is the proper standard
18 for proof in a criminal trial. That requirement does not apply
19 to a civil case such as this, and you should put it completely
20 out of your mind.

21 In this case the burden is on Mr. Picarella, the
22 plaintiff, to prove every essential element of his claims by a
23 preponderance of the evidence. If the proof should fail to
24 establish any essential element of Mr. Picarella's claims by a
25 preponderance of the evidence in this case, you should find for

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1 the defendant as to that claim.

2 Now let's talk about the specific claims in this case.
3 Mr. Picarella, the plaintiff in this case, has brought this
4 lawsuit under two types of law, a federal statute and a city
5 statute. The federal statute is Title VII of the United States
6 Code. The city statute is the New York City Human Rights Law.

7 In essence, these statutes prohibit employers from
8 retaliating against an employee who complains that his employer
9 is engaging in unlawful discrimination or who files a charge
10 with the Equal Employment Opportunity Commission. Opposing
11 discrimination in employment is a protected activity, whether
12 the protest is justified or not. Mr. Picarella alleges that
13 the defendant retaliated against him for reporting the sexual
14 harassment of a female co-worker by an HSBC executive and for
15 filing a charge with the EEOC.

16 I will now explain each of the statutes to you in
17 greater detail.

18 Plaintiff Picarella's Title VII claim.

19 Plaintiff Picarella first brings a claim under Title
20 VII against HSBC. Title VII provides, in relevant part, that
21 it shall be an unlawful employment practice for an employer to
22 discrimination against any of its employees because he has
23 opposed any unlawful employment practice, or because he has
24 made a charge to the Equal Employment Opportunity Commission.
25 This prohibits an employer subject to this statute from

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1 retaliating against an employee that complains that the
2 employer was engaged in an unlawful employment practice.

3 To establish his claims under Title VII, Mr. Picarella
4 must prove by a preponderance of the evidence:

5 First, that Mr. Picarella engaged in protected
6 activity, such as complaining of discrimination at HSBC,
7 specifically the sexual harassment of a female co-worker or
8 filing a charge with the EEOC;

9 Second, that HSBC was aware that Mr. Picarella was
10 engaging in such activity;

11 Third, that Mr. Picarella was subjected to a material
12 adverse action by HSBC at the time or after the protected
13 activity took place by materially changing the terms or
14 conditions of Mr. Picarella's employment; and

15 Fourth, that HSBC would not have taken the materially
16 adverse action in the absence of Mr. Picarella's protected
17 activity.

18 First element of plaintiff Picarella's Title VII
19 claim.

20 The first element of a retaliation claim under Title
21 VII is that the activity plaintiff engaged in that resulted in
22 retaliation was an activity protected by law. An employee has
23 a right to report and protest workplace sexual harassment where
24 such harassment has actually occurred or where the employee
25 reasonably believes in good faith that sexual harassment

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1 occurred.

2 To prove that he engaged in protected activity,
3 Mr. Picarella need not establish that he was correct in his
4 complaints or that there was indeed sexual harassment. He need
5 only show that he had a good faith reasonable belief that the
6 challenged actions by HSBC violated Title VII.

7 It is for you to decide whether any of these actions
8 constitute protected activity as I have defined that term. If
9 you find that these actions do constitute protected activity,
10 you must move on to the next element of Mr. Picarella's Title
11 VII claim. If you find that these actions do not constitute
12 protected activity, you must find in favor of HSBC with regard
13 to Mr. Picarella's Title VII claim.

14 Second element of plaintiff's Picarella's Title VII
15 claim.

16 The second element of a retaliation claim under Title
17 VII is that HSBC must have been aware of the protected
18 activity. General corporate knowledge that Mr. Picarella
19 engaged in a protected activity is sufficient to establish this
20 element of a retaliation claim under Title VII.

21 If you find that HSBC was aware that Mr. Picarella had
22 complained of the sexual harassment of a co-worker, then you
23 must move on to the third element of the Title VII claim. If,
24 however, you find that HSBC was not aware that Mr. Picarella
25 had complained of the sexual harassment of his co-worker, then

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1 you must find in favor of HSBC with regard to Mr. Picarella's
2 Title VII claim.

3 Third element of plaintiff Picarella's Title VII
4 claim.

5 The third element of retaliation claim under Title VII
6 is that the plaintiff suffered a material adverse action. An
7 adverse action is material if it would dissuade a reasonable
8 worker in Mr. Picarella's position from making or supporting a
9 complaint of sexual harassment. Personality conflicts, petty
10 slights, snubbing, minor annoyances, simple lack of good
11 manners and other ordinary tribulations of the workplace are
12 not materially adverse employment actions.

13 If you find that HSBC took action against
14 Mr. Picarella that might have discouraged a reasonable worker
15 in Mr. Picarella's position from complaining about sexual
16 harassment then you must move on to the fourth and final
17 element of the Title 7 claim.

18 If, however, you find that HSBC's alleged action
19 against Mr. Picarella would not have discouraged a reasonable
20 worker in Mr. Picarella's position from complaining about
21 sexual harassment, then you must find in favor of HSBC with
22 regard to Mr. Picarella's Title VII claim.

23 Fourth element of plaintiff Picarella's Title VII
24 claim.

25 Finally, Title VII uses a but-for test for causation.

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1 This means that in order to find that Mr. Picarella established
2 a Title VII claim, you must find that Mr. Picarella proved that
3 a material adverse action was taken against him because of his
4 protected activity, as I have defined that term. Mr. Picarella
5 must prove that retaliation was the but-for cause of the
6 materially adverse action, that is, the unlawful retaliation
7 would not have occurred in the absence of Mr. Picarella's
8 protected activity.

9 In considering whether Mr. Picarella has met his
10 burden, you must first decide whether HSBC was in fact
11 motivated by a desire to retaliate against Mr. Picarella
12 because of his complaints of sexual harassment. If not, you
13 must find in favor of HSBC.

14 If you conclude that HSBC was motivated by a desire to
15 retaliate against Mr. Picarella for having engaged in a
16 protected activity, you must next consider whether HSBC also
17 had a non-retaliatory reason for the material adverse action.
18 If you decide that HSBC did not have a non-retaliatory motive
19 for the material adverse action, and that the material adverse
20 action was solely motivated by retaliatory animus, then you
21 must find in favor of Mr. Picarella with regard to his Title
22 VII claim.

23 If, however, HSBC had both retaliatory and
24 non-retaliatory motives for taking the material adverse action
25 against Mr. Picarella, then you must consider whether the

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1 retaliatory motive was the but-for cause of the material
2 adverse action taken against Mr. Picarella. In other words,
3 you must consider whether HSBC would have taken the material
4 adverse action against Mr. Picarella absent the retaliatory
5 motive. This means that in order to find for Mr. Picarella
6 under Title VII, you must find that he has proven that he would
7 not have suffered any of the material adverse actions had he
8 not complained about the sexual harassment.

9 If, on the other hand, you decide that HSBC would have
10 taken the material adverse action against Mr. Picarella
11 regardless of its retaliatory intent, or if you find that HSBC
12 had no retaliatory motive at all, then you must find for HSBC
13 on Mr. Picarella's Title VII claim.

14 Circumstantial evidence of retaliatory motive.

15 You can see from these instructions that it is very
16 important in this case to determine the reasons why certain
17 actions were taken and the intent that motivated those actions.
18 HSBC contends that there were legitimate reasons for the
19 alleged adverse actions taken against Mr. Picarella.
20 Mr. Picarella claims that HSBC's explanations are pretextual,
21 that is, they are unworthy of belief and were not the real
22 reason for the alleged adverse actions.

23 How do juries go about deciding what was in someone's
24 mind? Direct proof concerning state of mind is often not
25 available. A person's state of mind can be inferred, however,

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1 from that person's words, action and conduct. A person's state
2 of mind can be established by surrounding facts and
3 circumstances at the time an action was taken and the
4 reasonable inferences to be drawn from those facts and
5 circumstances. Circumstantial evidence of a retaliatory motive
6 might include proof that the protected activity was followed by
7 closely in time by the adverse action, or evidence that the
8 plaintiff was treated differently than fellow employees who
9 were similarly situated.

10 However, an employee who has engaged in protected
11 activity, such as complaining about sexual harassment or
12 retaliation, is not entitled to special treatment. This means
13 that he should not be in a better position than other employees
14 solely because he made the complaint of sexual harassment or
15 retaliation.

16 Non-retaliatory reasons.

17 If Mr. Picarella proves each of the four elements of
18 his Title VII --

19 Let me see counsel in the robing room with the court
20 reporter.

21 (In robing room)

22 THE COURT: I wanted to confirm this stays in, because
23 this is in the Title VII section. I wanted to make sure there
24 was no objection to that. I wanted to take this moment, if
25 anyone wants me to do anything about the other portions where

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1 we talked about the complaining about sexual harassment, I
2 didn't mention the filing of the EEOC complaint each of those
3 times, but it does seem --

4 MR. BORTNICK: It seemed to be included because your
5 Honor did, on page 21, make that insertion. So long as when
6 the jury gets the written copy the verbal correction you made
7 on page 21 is in there.

8 THE COURT: Okay. Anything else?

9 MR. JACKSON: No.

10 THE COURT: Very good. I will continue.

11 (In open court)

12 THE COURT: Non-retaliatory reasons.

13 If Mr. Picarella proves each of the four elements of
14 his Title VII claim, HSBC may demonstrate that it based its
15 employment action on legitimate, non-retaliatory reasons.

16 When you consider the question of retaliatory motive,
17 you are not to judge the wisdom of HSBC's action but are
18 instead to decide whether the non-retaliatory reasons advanced
19 by HSBC were the actual reasons for HSBC's actions. An
20 employer or supervisor is entitled to make decisions for good
21 reasons, bad reasons, or for no reason at all, so long as the
22 decision is not motivated by unlawful retaliation. The issue
23 in this case is not whether you would have taken any of the
24 alleged adverse actions against Mr. Picarella if you were in
25 charge. Rather, you are to determine whether HSBC took the

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1 alleged adverse actions against Mr. Picarella because of
2 non-retaliatory reasons or because of his protected activity.

3 If you believe that the reasons offered by HSBC for
4 adverse actions taken against Mr. Picarella are false, you may,
5 but are not required to, infer that HSBC acted out of a desire
6 to retaliate against Mr. Picarella. However, if you find that
7 the reasons given by HSBC for the alleged adverse actions are
8 false, that does not necessarily mean that the true motive was
9 the unlawful retaliatory motive argued by Mr. Picarella.
10 Mr. Picarella's personal, subjective belief that he was
11 retaliated against is not sufficient to meet his burden of
12 proof. It is not enough for him to show his subjective belief,
13 feelings, suspicions, or speculation that the reasons stated by
14 HSBC for the alleged adverse actions are not genuine.

15 In determining whether Mr. Picarella has carried his
16 burden of proving retaliatory intent, you will consider all the
17 facts and circumstances that your common sense and good
18 judgment tell you are relevant to deciding why someone acts as
19 they did. The central question is whether HSBC took the
20 alleged adverse actions against Mr. Picarella because he
21 engaged in a protected activity, and the burden is on
22 Mr. Picarella to prove that.

23 If you find that Mr. Picarella has proven all of the
24 elements of his retaliation claim, but that HSBC has proven by
25 a preponderance of the evidence that it would have taken the

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1 same action against Mr. Picarella regardless of any protected
2 activity and regardless of any retaliatory motive, then you
3 must return a verdict in favor of HSBC on Mr. Picarella's Title
4 VII claim.

5 Liability for retaliation on a corporate employer
6 under Title VII.

7 Title VII imposes liability for retaliation on a
8 corporate employer where the offending employee is an officer,
9 manager, or other supervisory employee, and where that employee
10 was acting within the scope of his or her employment when he or
11 she unlawfully retaliated against the plaintiff.

12 In determining whether a managerial employee acted
13 within the scope of his or her employment, you must consider
14 the following factors:

15 First, whether the managerial employee's material
16 adverse action fell within the discretion and control of HSBC;

17 Second, whether the managerial employee acted under
18 the express or implied authority of HSBC;

19 Third, whether the managerial employee's material
20 adverse action was in furtherance of HSBC's interests;

21 Fourth, whether the managerial employee was
22 discharging his duty to HSBC by taking material adverse action
23 against Mr. Picarella;

24 Fifth, whether the material adverse action was part of
25 the work assigned by HSBC; and

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1 Sixth, whether the material adverse action was so
2 closely connected with what the managerial employee was hired
3 to do that it may be regarded as a method, even though an
4 improper one, of carrying out the objectives of the employment.

5 By contrast, where a managerial employee engages in
6 conduct for wholly personal reasons which are outside the scope
7 of his employment, the employer is not responsible for that
8 conduct. However, even where a managerial employee engaged in
9 conduct for a wrongful purpose or with partially personal
10 motives, the employer is liable if the manager engaged in the
11 conduct to further the interests of the employer or as part of
12 the work assigned by the employer.

13 In assessing Mr. Picarella's claim against HSBC, you
14 must consider whether a high level managerial employee of HSBC,
15 acting within the scope of his or her employment with HSBC,
16 unlawfully retaliated against Mr. Picarella. If you find that
17 a high level managerial employee of HSBC, while acting within
18 the scope of his or her employment with HSBC, unlawfully
19 retaliated against Mr. Picarella, you will find HSBC liable for
20 retaliation under Title VII.

21 Plaintiff Picarella's city law claims.

22 Mr. Picarella also asserts a retaliation claim under
23 the New York City Human Rights Law. The elements of a
24 retaliation claim under the city human rights law are similar
25 to those under Title VII, but there are some important

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1 differences, which I will explain.

2 To prevail on his retaliation claim under the city
3 human rights law, Mr. Picarella must prove each of the
4 following four elements by a preponderance of the evidence:

5 First, that Mr. Picarella engaged in a protected
6 activity, such as complaining of discrimination at HSBC,
7 specifically, the sexual harassment of a female co-worker;

8 Second, that HSBC knew that Mr. Picarella was engaging
9 in such activity;

10 Third, that HSBC engaged in conduct that was
11 reasonably likely to deter a person from engaging in that
12 protected activity; and

13 Fourth, that HSBC's conduct was motivated, at least in
14 part, by Mr. Picarella's protected activity.

15 First element of Mr. Picarella's city law claims.

16 In deciding whether Mr. Picarella engaged in protected
17 activity under the city human rights law, the instructions
18 regarding protected activity set forth in connection with
19 Mr. Picarella's Title VII retaliation claim applies with equal
20 force.

21 Second element of Mr. Picarella's city law claims.

22 In deciding whether Mr. Picarella has proved that HSBC
23 knew that he had engaged in protected activity, the
24 instructions on this issue given in connection with
25 Mr. Picarella's Title VII retaliation claim applies with equal

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force.

(Continued on next page)

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1 THE COURT: (Continuing) Third element of
2 Mr. Picarella's city law claims.

3 The third element of the retaliation claim under the
4 City Human Rights Law is that HSBC engaged in conduct that was
5 reasonably likely to deter a person from engaging in that
6 protected activity. To find that this element has been proven,
7 you need not find that the alleged retaliation of which
8 Mr. Picarella complains resulted in an ultimate action with
9 respect to his employment, or even in a materially adverse
10 change in the terms and conditions of his employment.

11 In contrast to Title VII, to constitute retaliatory
12 conduct under the City Human Rights Law, HSBC's conduct need
13 not be materially adverse to Mr. Picarella. Instead, you need
14 only find that the conduct at issue was reasonably likely to
15 deter a person from engaging in protected activity.

16 The fourth element of Mr. Picarella's city law claims.
17 The fourth element of retaliation under the City Human Rights
18 Law that Mr. Picarella must prove by a preponderance of the
19 evidence is that Mr. Picarella's protected activity was a
20 motivating factor in HSBC's decision to engage in conduct that
21 was reasonably likely to deter a person from engaging in
22 protected activity. Mr. Picarella contends that HSBC took
23 action against him because either he protested sexual
24 harassment or he filed a charge with the EEOC. HSBC claims
25 that the actions at issue were taken because of HSBC's

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1 legitimate concerns about Mr. Picarella's job performance.

2 In order to carry his burden as to this element,
3 Mr. Picarella need not establish that his protected activity
4 was the sole or principal reason for any action that HSBC took
5 against him that constitutes conduct that would be reasonably
6 likely to deter a person from engaging in protected activity.
7 The City Human Rights Law is violated when retaliatory intent
8 is a motivating factor for HSBC's action, whether or not that
9 retaliatory motive was the sole basis for the action. If
10 Mr. Picarella proves that there was a retaliatory motive for
11 any action HSBC took against him that would be reasonably
12 likely to deter a person from engaging in protected activity,
13 this element is satisfied. Mr. Picarella may show either that
14 the individual who made the decision to take such action was
15 motivated in part by a desire to retaliate against him, or that
16 an individual who was substantially motivated by a retaliatory
17 intent played a meaningful role in the decision.

18 The instructions I gave you in connection with
19 Mr. Picarella's retaliation claim under Title VII regarding
20 circumstantial evidence of retaliatory motive applies with
21 equal force to Mr. Picarella's claim under the City Human
22 Rights Law.

23 Liability for retaliation on a corporate employer
24 under City Human Rights Law.

25 The City Human Rights Law imposes liability on an

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1 employer where the offending employee exercised managerial or
2 supervisory responsibility, and where that employee was acting
3 within the scope of his or her employment when he or she
4 unlawfully retaliated against the plaintiff.

5 In determining whether any HSBC officer, manager, or
6 supervisor acted within the scope of employment under the City
7 Human Rights Law, you should use the same test that I explained
8 above in connection with Mr. Picarella's retaliation claim
9 under Title VII.

10 Damages. Damages generally.

11 If you find that Mr. Picarella has proven any of his
12 retaliation claims by a preponderance of the evidence, you must
13 then determine the damages to which he is entitled. Please
14 note that just because I am instructing you on how to award
15 damages does not mean that I have any opinion on whether the
16 defendant should be held liable. That is for you to decide on
17 the evidence presented and the law I have given you.

18 You should not reach the issue of damages unless you
19 find that the plaintiff has established the liability of the
20 defendant. If you decide that Mr. Picarella has not proven
21 that he is entitled to recover from HSBC, you need go no
22 further. I am instructing you on damages only so that you will
23 have guidance should you decide that the plaintiff is entitled
24 to recover damages.

25 Nature of the plaintiff's damages claims. In this

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1 case, Mr. Picarella seeks to recover back pay, front pay,
2 compensatory damages, and punitive damages. Mr. Picarella has
3 the burden of proving each of these damages by a preponderance
4 of the evidence. I will now describe each of these elements of
5 damages to you.

6 Back pay damages.

7 If you determine that HSBC discriminated against
8 Mr. Picarella by failing to promote or terminating him, then
9 you must determine the amount of damages that HSBC have caused
10 Mr. Picarella. You may award as actual damages an amount that
11 reasonably compensates Mr. Picarella for any lost wages and
12 benefits that Mr. Picarella would have received had he not been
13 discriminated against. Should you determine that HSBC
14 illegally terminated Mr. Picarella's employment, you may
15 include in your back pay award all forms of compensation that
16 he would have earned.

17 You must reduce any award by the amount of any back
18 pay that you award Mr. Picarella to the extent that he did or
19 should -- that he did or should have mitigated his damages --
20 you must reduce any award by the amount of any back pay that
21 you award Mr. Picarella to the extent that he should have
22 mitigated his damages, as I will instruct you in a moment.

23 Front pay damages.

24 You must calculate separately, as future damages, a
25 monetary amount equal to the present value of the wages and

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1 benefits Mr. Picarella would have earned had he not been
2 discriminated against or terminated for the period from the
3 date of your verdict until the date when Mr. Picarella would
4 have voluntarily resigned or obtained other employment.

5 You must also reduce any award to its present value by
6 considering the interest Mr. Picarella could earn on the amount
7 of the award if he had made a relatively risk-free investment.
8 The reason you must make this reduction is because an award of
9 an amount representing future loss of earnings is more valuable
10 to Mr. Picarella if he receives it today than if he received it
11 in the future, when he would otherwise have earned it. It is
12 more valuable because he can earn interest on it for the period
13 of time between the date of the award and the date he would
14 have earned the money. Thus, you should adjust the amount of
15 any award for future loss of earnings by the amount of interest
16 Mr. Picarella can earn on that amount in the future.

17 Finally, if you find that Mr. Picarella is entitled to
18 recovery of future earnings from HSBC, then you must reduce the
19 amount of any front pay that you award him to the extent that
20 he should have mitigated his damages, as I will instruct you in
21 a moment.

22 Compensatory damages.

23 If you return a verdict for Mr. Picarella, finding
24 that HSBC retaliated against Mr. Picarella, then you must
25 determine an amount that is fair compensation for

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1 Mr. Picarella's damages. You may award compensatory damages
2 only for injuries Mr. Picarella proves were caused by HSBC's
3 allegedly wrongful conduct.

4 The damages that you award must be fair
5 compensation -- no more and no less. You may award damages for
6 any pain, suffering, humiliation, mental anguish or
7 reputational harm that Mr. Picarella experienced as a
8 consequence of HSBC's alleged retaliation. The nature and
9 degree of pain, suffering, humiliation, mental anguish or
10 reputational harm may differ widely from person to person.
11 Consequently, the law does not try to fix, nor does the law
12 permit a precise formula by which pain, suffering, humiliation,
13 mental anguish, or reputational harm, as an element of
14 compensatory damages, may be measured and reduced to dollars
15 and cents. Instead of providing a formula for measuring these
16 damages, the law leaves the determination of the amount of
17 damages to your common sense and good judgment, drawing
18 reasonable inferences from the facts in evidence. Any award
19 you make should be fair in light of the evidence presented at
20 the trial.

21 You may not award damages based on sympathy,
22 speculation, or guesswork. On the other hand, the law does not
23 require that Mr. Picarella prove the amount of his losses with
24 mathematical precision, but only with as much definiteness and
25 accuracy as circumstances permit. Finally, evidence of

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1 treatment for psychological harm is not required for an award
2 of compensatory damages.

3 Mitigation of damages. Any person who claims damages
4 as a result of an alleged wrongful act on the part of another
5 has a duty under the law to mitigate those damages. For
6 purposes of this case, the duty to mitigate damages requires
7 Mr. Picarella to be reasonably diligent in seeking
8 substantially equivalent employment to the position he had with
9 HSBC. The burden is on HSBC to prove that Mr. Picarella did
10 not mitigate damages for loss of compensation. To prove that
11 Mr. Picarella failed to mitigate damages, HSBC must prove by a
12 preponderance of the evidence that:

13 First, work comparable to the position Mr. Picarella
14 held with HSBC was available; and

15 Second, Mr. Picarella did not make reasonably diligent
16 efforts to obtain it.

17 Mr. Picarella must accept employment that is of a like
18 nature. In determining whether employment is of a like nature,
19 you may consider:

20 One, the type of work; two, the hours worked; three,
21 the compensation; four, the job security; five, the working
22 conditions; and six, the other conditions of employment.

23 You must decide whether Mr. Picarella acted reasonably
24 in not seeking or accepting a particular job. If you determine
25 that he did not make reasonable efforts to obtain another

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1 similar job, you must decide whether any damages resulted from
2 plaintiff's failure to do so.

3 You must not compensate Mr. Picarella for any portion
4 of plaintiff's loss of compensation resulting from plaintiff's
5 failure to make reasonable efforts to reduce Mr. Picarella's
6 loss of compensation.

7 Mr. Picarella claims the acts of HSBC were done with
8 malice or reckless indifference to his protected right to be
9 free from retaliation so as to entitle him to an award of
10 punitive damages in addition to compensatory damages. Just
11 because I am instructing you on how to award punitive damages
12 does not mean that I have any opinion on whether a defendant
13 should be held liable or that the defendants are entitled to
14 punitive damages.

15 In some cases punitive damages may be awarded for the
16 purposes of punishing a defendant for its wrongful conduct and
17 to deter others from engaging in similar wrongful conduct.
18 However, an employer may not be held liable for punitive
19 damages because of discriminatory acts on the part of its
20 managerial employees where those acts by such employees are
21 contrary to the employer's own good faith efforts to comply
22 with the law by implementing policies and programs designed to
23 prevent such unlawful discrimination in the workplace.

24 An award of punitive damages would be appropriate in
25 this case only if you find for Mr. Picarella and then further

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1 find from a preponderance of the evidence: First, that an HSBC
2 officer, manager, or supervisor personally acted with malice or
3 reckless indifference to Mr. Picarella's right to be free from
4 retaliation; and second, that HSBC itself had not acted in a
5 good faith attempt to comply with the law by adopting policies
6 and procedures designed to prohibit such discrimination in the
7 workplace.

8 If you find that punitive damages should be assessed
9 against HSBC, you may consider the financial resources of HSBC
10 in fixing the amount of such damages.

11 Punitive damages must bear a reasonable relationship
12 to Mr. Picarella's actual injury. However, there is no simple
13 way to link punitive to compensatory damages. In determining a
14 reasonable relationship to the actual injury, you must consider
15 all relevant factors. These include whether HSBC: Engaged in
16 a pattern of discrimination toward Mr. Picarella; acted
17 spitefully or malevolently towards Mr. Picarella; showed a
18 blatant disregard for civil legal obligations; failed to
19 investigate reports of retaliation against Mr. Picarella; and
20 failed to take corrective action concerning discriminatory acts
21 or comments by its employees.

22 If you find by a preponderance of the evidence that
23 HSBC acted with malicious intent to violate Mr. Picarella's
24 rights or injured him unlawfully, or if you find that HSBC
25 acted with a callous or reckless disregard of Mr. Picarella's

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Charge

1 rights, then you may decide that punitive damages are
2 appropriate. Remember, however, that an award of punitive
3 damages is discretionary. In fixing the amount of punitive
4 damages, you should consider the degree to which a certain sum
5 would punish or deter HSBC, or employers like HSBC, from
6 committing wrongful acts in the future.

7 Nominal damages.

8 If Mr. Picarella established the elements of his claim
9 but has not proven by a preponderance of the evidence any
10 injury or actual damages meriting compensatory damages, then
11 you may return an award of nominal damages not to exceed the
12 sum of one dollar.

13 As I said earlier, in determining the facts of this
14 case you must rely on your recollection of the evidence.
15 Additionally, if any of you wishes to have witness testimony or
16 exhibits provided, you may request that. I am not suggesting
17 that you must or should do this. I am simply saying that we
18 can make this available to you.

19 If any juror wishes to have testimony or exhibits
20 provided, simply send me a written note, through your
21 foreperson. If you request testimony, please try to be as
22 specific as possible about which portions of the testimony you
23 would like read or provided. If you are not specific, the
24 lawyers must agree on what portions of the testimony you are
25 requesting; and if they disagree, I must resolve that

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1 disagreement. In any event, it takes time for the court
2 reporter to find testimony in the record, so please be patient
3 if you send a note and there seems to be a delay in responding
4 to you. If you want any further explanation of the law as I
5 have explained it to you, you may also request that.

6 Any notes that you send to me should be one signed by
7 your foreperson indicating the date and time of the note; two,
8 sealed in an envelope; and three, given to the marshal who will
9 be seated outside the jury room throughout your deliberations.
10 If you do send me any notes, please make sure that you do not
11 give any indication of your present state of thinking on any
12 disputed issue. Particularly, you must not inform me of your
13 vote count on any issue.

14 Any notes you may have taken during the trial are
15 simply an aid to your memory. Because the notes may be
16 inaccurate or incomplete, they may not be given any greater
17 weight or influence than the recollection of other jurors about
18 the facts or the conclusions to be drawn from the facts in
19 determining the outcome of the case. Any difference between a
20 juror's recollection and a juror's notes should always be
21 settled by asking to have the court reporter's transcript on
22 that point provided to you. You must base your determination
23 of the facts and ultimately your verdict on the court record
24 rather than on any juror's notes.

25 The juror who sits in the number one chair will be the

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Charge

1 foreperson of the jury unless for any reason that person
2 prefers not to act in that capacity in which event your first
3 order of business will be to send me a note identifying the new
4 foreperson.

5 The foreperson presides over the deliberations and
6 speaks for the jury in open court. Moreover, the foreperson
7 signs and sends all notes to me and notifies the marshal when
8 the jury has reached a verdict.

9 The foreperson has no greater voice or authority than
10 any other juror.

11 It is your duty as jurors to consult with one another
12 with a view to reaching a unanimous verdict. Each of you must
13 decide the case for yourself, after consideration of the
14 evidence with your fellow jurors. You should not hesitate to
15 change an opinion if the discussion persuades you that you
16 should. However, you are not to give up a point of view that
17 you conscientiously believe -- however, you are not to give up
18 a point of view that you conscientiously believe in simply
19 because you are outnumbered or outweighed. You should vote
20 with the others only if you are convinced on the evidence,
21 facts, and law that it is the correct way to decide the case.

22 I remind you that no juror should surrender his or her
23 conscientious beliefs about the effect or weight of the
24 evidence solely for the purpose of returning a unanimous
25 verdict.

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1 In an effort to assist you, your verdict in this case
2 will be a verdict in the form of a series of questions to be
3 answered by you in the jury room after you have begun your
4 deliberations.

5 No inference is to be drawn from the way the questions
6 are worded about what the answer should be. The questions are
7 not to be taken as any indication that I have any opinion about
8 how they should be answered.

9 Before the jury attempts to answer any question, you
10 should read all of the questions, and make sure that everyone
11 understands each question. Before you answer the questions,
12 you should deliberate in the jury room and discuss the evidence
13 that relates to the questions you must answer. When you have
14 thoroughly considered the questions and the evidence that
15 relates to those questions, record the answers to the questions
16 on the verdict form. Remember, all answers must be unanimous.

17 After you have reached a verdict and your foreperson
18 has filled in the verdict form that has been given to you, each
19 of you should sign and date it. The foreperson should then
20 send me a note indicating that you have reached a verdict. Do
21 not specify what the verdict is in the note. Instead, the
22 foreperson should retain the verdict sheet, and hand it to the
23 deputy clerk in open court when you are called in.

24 I remind you that your verdict must be unanimous.
25 Once your verdict is announced by your foreperson in open court

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Charge

1 and officially recorded it cannot ordinarily be revoked.

2 I'll be right with you in a second. I want to see
3 counsel in the robing room.

4 (Continued on next page)

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1 (In the robing room)

2 THE COURT: I made a few edits on the fly. Most of
3 them were sort of grammatical things. I did edit the stuff
4 regarding the mitigation of damages. I didn't say "did"
5 because it didn't seem that it flowed and it didn't seem
6 exactly correct either. But, I don't know. Any objection to
7 that? I took the "did" out. Sort of did mitigate damages and
8 just said "should."

9 MR. JACKSON: No objection.

10 MR. BORTNICK: That was fine. I noticed that as well.
11 Then you did something on Exhibit No. 39 that we had talked
12 about that was correct, but -- I'm sorry. 39 we had talked
13 about previously. But on page 40 I saw that you did make one
14 change. It's minor but I just, for the sake --

15 THE COURT: Yes. I edited as well on 40 "to provide
16 to you" instead of saying "read to you" so we have the option
17 of giving them the written transcript.

18 MR. BORTNICK: There was one other issue about the
19 foreperson. We don't have a juror number one so I think maybe
20 it should be juror number two.

21 MR. HUBBARD: She becomes juror number one.

22 THE COURT: I think they can figure it out. If you
23 want me to say something. I don't want to keep drawing their
24 attention to the fact that we lost somebody. Any objection to
25 my reading of the instructions?

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1 MR. JACKSON: No, your Honor.

2 THE COURT: We'll make those edits that I made on the
3 fly in the written copy and we'll bring that in to the jury.
4 So I intend to send the jury into the jury room to deliberate.
5 Anything else I need to tell them right now?

6 MR. JACKSON: No, your Honor.

7 THE COURT: Then once -- we'll mark the verdict form
8 as a court exhibit, send that in to them, and then we'll make
9 these other edits and once they're done we'll send in the jury
10 instruction.

11 MR. JACKSON: Thank you, Judge.

12 (Continued on next page)

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Charge

1 (In open court)

2 THE COURT: Now you may begin your deliberations soon.
3 When you go in to deliberate you may discuss the case amongst
4 yourselves. You can only discuss the case amongst yourselves
5 when all of you are assembled in the jury room. If someone
6 needs to step out and take a break you should cease your
7 deliberations until all of you are assembled in the jury room.
8 Hold on just a second.

9 THE DEPUTY CLERK: Marshal, come forward, please.

10 (Marshal sworn)

11 THE COURT: So again, Members of the Jury, you may
12 start your deliberations. We will send the verdict form in to
13 you soon. And, shortly, we will send you in a written copy of
14 the instructions. There are some minor edits we have to make.
15 So once we've done that we'll send that in to you as well.

16 (At 3:24 p.m., the jury retired to deliberate)

17 THE COURT: Okay. Counsel may be seated. Let me ask
18 counsel to look at this. We have this marked as Court Exhibit
19 2. One final look. That's the verdict form. Once you've done
20 that, we'll have that sent in to the jury. Then I'll need
21 counsel to step back for a second. I have a couple other
22 matters on. I would normally let counsel leave. It's 3:30.
23 Counsel may hang out here since we're not going to go past five
24 o'clock tonight.

25 MR. JACKSON: That's excellent, your Honor. I'm going

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1 to -- could we be permitted, if we step into the hallway, or
2 anything like that?

3 THE COURT: Yes. That's fine.

4 MR. JACKSON: I'm going to leave my -- I'm just
5 going -- just in case anything, I'm going to leave my cellphone
6 number.

7 THE COURT: Leave you cellphone number with my deputy.

8 MR. BORTNICK: I was, the same with mine, because I
9 did not, in the ten minutes or fifteen minutes, get a chance to
10 get anything to eat.

11 THE COURT: Just check that verdict form first.

12 All good on the verdict form?

13 MS. LEVIN: Yes. May I approach?

14 THE COURT: Thank you. We'll provide that to the
15 jurors now.

16 Thank you very much.

17 MR. JACKSON: Thank you, your Honor.

18 (Recess pending verdict)

19 THE COURT: So first order of business is we have the
20 jury instructions that counsel have both reviewed and we're
21 ready to send that in to the jury.

22 Is that correct, counsel?

23 MR. HUBBARD: Yes, your Honor.

24 MR. BORTNICK: Yes.

25 MR. JACKSON: Yes, your Honor.

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1 MR. BORTNICK: The corrections that you read, you
2 know, the verbal corrections you made were incorporated into
3 Court Exhibit 1.

4 THE COURT: Correct.

5 So we also have a note from the jury, Court Exhibit 3,
6 which counsel have received a copy of. I'll read it into the
7 record. Dated today, December 14, 2016, 4:25 p.m.

8 Dear Judge Carter,

9 We would like to receive the following documents.

10 Number one. Juror instructions.

11 Number two. HSBC whistleblower anti retaliation
12 policy.

13 Three. All of Mike Picarella's mid year and full year
14 performance reviews.

15 Four. All performance reviews for Carol Jenner.

16 Thank you.

17 Juror No. 1.

18 So, how do -- here's what I propose and then I'll hear
19 from counsel. I will bring the jury out, read the note to
20 them, tell them we've received the note.

21 The jury instructions they have now. In terms of the
22 HSBC whistleblower anti retaliation policy. Are counsel in
23 agreement as to what that is, which document that is?

24 MR. HUBBARD: It's Defendant's Exhibits 248.

25 MR. BORTNICK: We've been conferring when we were

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1 called in.

2 MR. JACKSON: Yes, your Honor.

3 MR. BORTNICK: Except for that last one we had
4 actually conferred on what all the other requests.

5 THE COURT: So let's do this then. Let's have counsel
6 confer.

7 MR. JACKSON: Well, Judge not to -- I'm sorry.

8 THE COURT: Go ahead.

9 MR. JACKSON: We've conferred. I think we're in
10 agreement on what needs to go back.

11 THE COURT: Right.

12 MR. JACKSON: So I don't think that the Court actually
13 needs to bring the jury out. I think we can simply put on the
14 record what we think needs to go back and then we can just give
15 that to your deputy to send back, if there is no objection.

16 THE COURT: We can do that, if both counsel agree to
17 that we can just send those documents in without bringing the
18 jury out. It may be -- that's fine. If both counsel want to
19 do that we'll just send those documents in if both counsel are
20 in agreement with what those are.

21 MR. HUBBARD: For the plaintiff I think we are, your
22 Honor.

23 THE COURT: And defendant.

24 MR. JACKSON: Yes, your Honor.

25 THE COURT: So we will just -- I think we probably

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1 need to at least give them some sort of acknowledgment that
2 we've received the note and have it in the record of some sort
3 so we can either write something or I can just bring them out
4 here quickly and I can say to them we've received the note,
5 we're going to send it all in to them, and then send it all
6 back. But we need to have something in the record just
7 indicating that --

8 MR. JACKSON: Your Honor, our preference would be,
9 just because we find it to disturb the flow of juror
10 conversation to just bring them out whenever they send a note,
11 for this we would prefer if the Court would write a brief note
12 that says we've received your note. Here are the things you've
13 requested. Signed, Judge Carter.

14 THE COURT: We can do that. I will either counsel --
15 I guess I'll ask my staff to do that. My penmanship isn't
16 great. So I will have someone write a note that says the note
17 will say we have received your note and we are sending these
18 documents in. Sound good to everyone?

19 MR. HUBBARD: Yes, your Honor.

20 THE COURT: We'll mark that as Court Exhibit 4, our
21 responsive note.

22 I'll be right back.

23 All right, counsel we have a note here. We have our
24 note.

25 We have received your note and are sending the

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1 requested documents in.

2 Look at it and stick a sticker on it as Court Exhibit
3 4. We'll send it in.

4 MR. JACKSON: Your Honor, it appears we have a slight
5 dispute.

6 THE COURT: Okay.

7 MR. JACKSON: I don't think it's very complicated.

8 The thing is there are some exhibits that are DXs and
9 PXs just because what happened is at the last minute plaintiffs
10 took a bunch of our exhibits and marked them as PXs so that
11 they could introduce them. So there are some that are
12 duplicates. Mr. Hubbard has informed me that he wants only PXs
13 to go back to the jury. I think it would be fair and
14 appropriate to the extent that there's a duplicate for all of
15 these that we just sort of split it in half and do PXs and DXs.

16 MR. HUBBARD: I don't believe any of these, your
17 Honor, were originally marked as Defendant's Exhibits. I think
18 they were marked as Plaintiff's Exhibits. And they were
19 introduced first. It's no big deal. But we introduced these
20 exhibits and it seems to me that it makes some sense to send
21 them in as PX. It's not going to disturb the drink, so.

22 THE COURT: Is there an issue -- are the DXs and the
23 PXs all in evidence?

24 MR. HUBBARD: Yes. I don't know if the DXs are.

25 MR. JACKSON: They're all in evidence, your Honor.

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1 THE COURT: So then why don't we I guess just -- we'll
2 just -- why don't we just send in the PXs and the DXs.

3 MR. JACKSON: That's great, Judge.

4 THE COURT: Just send in the DX and the PX.

5 So here's the note we're sending that in. Let me find
6 out from counsel. It's about 4:54. How do you want to
7 proceed? We usually break at 5. I know some of the jurors
8 have childcare issues and the like. It doesn't seem from this
9 note that -- who knows what the jury is going to do but it
10 doesn't seem that the verdict is imminent but who knows what
11 they're going to do. It seems like it may make sense to send
12 in this note and then soon bring the jury out and then tell
13 them we're going to dismiss them for the day and have them come
14 back at 9:30.

15 MR. JACKSON: We could do that, your Honor. I think
16 it might be prudent to send this stuff back. And perhaps, if
17 the Court is inclined, send them a note to just ask them how
18 long they would like to deliberate today and if they'd like to
19 come back tomorrow.

20 MR. HUBBARD: I don't think we should do that, Judge.

21 THE COURT: I don't want to do that since we've been
22 on sort of a same schedule. So I think -- my sense is if we
23 say to them we're going to dismiss you for the day and you'll
24 come back at 9:30, if they all start jumping up and down saying
25 no, no, no, no, then we'll deal with that. But I would be

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1 inclined to do that, although we have another note now, it
2 looks like.

3 My guess is this addresses counsel concern. I'll just
4 read it in before we start making copies of it and the like.

5 So it says there are two jurors who will leave the
6 jury room for five to ten minutes to inform their families that
7 they are staying late. Thank you, juror number one. So that's
8 what the note says.

9 What do you want to do, counsel?

10 MR. JACKSON: Your Honor, I think it seems like the
11 jury feels like they're making progress. I think we should
12 send them a note saying you're free to continue deliberating.
13 We're sending you back these documents. Please let us know
14 when you would like to -- how long you'd like to deliberate or
15 when you would like to end for today.

16 THE COURT: Plaintiff's counsel, what's your take on
17 that?

18 MR. HUBBARD: Your Honor, I think we should stick to
19 the same schedule we've had. I don't know how long they expect
20 that they can deliberate so -- and they may make phonecalls by
21 the time we find out what happens with the phonecalls I have no
22 idea what they're going to say. So I'm not sure we're making a
23 lot of progress by changing the schedule and having them make
24 these phonecalls and that kind of thing. I think we should
25 abide by the schedule we had before, have them come back fresh

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1 in the morning.

2 THE COURT: Well if -- I guess I need to do some
3 inquiries and figure out how long -- I don't want to impose on
4 the court personnel and the court reporter and my staff. I
5 want to kind of get a sense of how long folks can hang out
6 because I think we need to let the jury know -- if we're going
7 to let them stay past five o'clock, if we're going to do that,
8 it would be appropriate to let them know how long we'd be
9 available because we can't stay here until ten o'clock tonight
10 and I'm a little concerned about doing that. But what are
11 counsel's thoughts on that?

12 MR. HUBBARD: I'm very concerned about doing that,
13 Judge, because it appears to impose a time limit on their
14 deliberations that really shouldn't be imposed. So I'm very
15 concerned about that.

16 MR. JACKSON: No, your Honor. I don't think that's
17 right. I know that -- we've had multiple cases where courts
18 have allowed the jurors to continue deliberating for a little
19 bit longer. I think what the Court is suggesting is entirely
20 inappropriate.

21 Just to tell the jurors: It sounds like you would
22 like to stay a little bit longer. We can only stay until X
23 time or please let us know how long you intend to stay and then
24 if they say a time that goes beyond what the time is then --
25 that works for the court, we can send a note back that says

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1 we're going to stop today at X time and that could be that.

2 But it does seem that where they are making a special effort --
3 at the point that deliberations begin, it's really the jury's
4 deliberations and they are making a special effort to continue
5 their deliberations right now.

6 THE COURT: Let me just find out some things real
7 quick from the -- let me just -- let's just go off the record
8 for a second.

9 (Discussion off the record).

10 THE COURT: Okay. I think, again, I think the best
11 course of action is to let the jury know we appreciate their
12 efforts but the Court is not available later on today so we'll
13 ask them to come back tomorrow at 9:30. So that's what we'll
14 do in terms of that request. And in terms of the other
15 request, I can still send that note in to them now but it may
16 make sense at this point just to answer that when they come
17 out. Counsel have any position on that?

18 MR. HUBBARD: Yes, your Honor. And then we can send
19 the exhibits in in the morning because it will take some time
20 to collect them.

21 MR. JACKSON: I think we -- I think, your Honor,
22 frankly, we should send the exhibits in and at least respond to
23 their request before we -- and let them have the exhibits for
24 two minutes before we --

25 THE COURT: Let's do that. Let's send in the note,

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1 send in the exhibits and then 45 seconds later we'll bring the
2 jury out and tell them that unfortunately we're not available
3 later on today and we'd ask them to come back at 9:30 in the
4 morning.

5 Has it gone in now?

6 THE DEPUTY CLERK: Yes. The note has gone in, Judge.

7 THE COURT: Where is the most recent note?

8 MR. JACKSON: Your Honor, we have our exhibits
9 together. We're just waiting on the plaintiffs to pull their
10 exhibits.

11 THE COURT: So, wait. Have the exhibits not gone in
12 yet?

13 MR. JACKSON: No. We're waiting on plaintiffs to
14 assemble their exhibits.

15 MR. HUBBARD: I've got to get my exhibit box. It
16 takes a minute, please.

17 MR. JACKSON: We've been sitting here for a while.

18 MR. HUBBARD: I know counsel is in a hurry to get them
19 back but it takes a second to pull them.

20 THE COURT: I want to get them out here now so they're
21 not running around trying to make these -- so they don't leave
22 and make these calls to stay late since we're not going to stay
23 late today. It may make sense to just give them this answer to
24 the other one. I guess we'll just answer the other one in
25 writing tomorrow if need be.

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1 So let's bring the jury out and I will read this most
2 recent note and I will let them know that unfortunately we
3 cannot stay late today and we'll ask them to come back at 9:30.
4 And what's counsel's position regarding the earlier note? I
5 guess we'll just send in our note response tomorrow morning.

6 MR. HUBBARD: Yes.

7 THE COURT: Okay. So let's bring the jury out.

8 MR. JACKSON: Judge, can I ask one thing?

9 THE COURT: Yes.

10 MR. JACKSON: Tomorrow at 9:30 the jurors can go
11 straight to deliberation.

12 THE COURT: Absolutely. They're not checking in here.
13 Tomorrow I will tell them to get here at 9:30. They go
14 straight to the jury room. I will again tell them they cannot
15 start deliberations until all the jurors are there.

16 MR. JACKSON: Great. Thank you very much, Judge.

17 (Jury present; time noted: 5:03 p.m.)

18 THE COURT: Thank you. Please be seated.

19 We received your most recent note. Court Exhibit 5.
20 Dear Judge, there are two jurors who will leave the jury room
21 for five to ten minutes to inform their families that they are
22 staying late. Thank you. Signed Juror No. 1.

23 In response to your note, unfortunately, the Court is
24 not available to stay late today. So we're going to ask that
25 you come back tomorrow at 9:30. You do not need to come into

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1 the courtroom. You report directly to the jury room. And you
2 may begin your deliberations only when all of you are together
3 in the jury room.

4 In the meantime do not discuss the case with anyone
5 else. Do not discuss the case even amongst yourselves unless
6 all of you are together in the jury room. Don't do any
7 independent research related to any of the issues pertaining to
8 this case or to any of the parties.

9 Have a wonderful evening and, again, at 9:30 you don't
10 need to check in here, just go straight to the jury room. And
11 when everyone is assembled you may resume your deliberations.
12 Have a pleasant evening.

13 (Jury not present)

14 THE COURT: Please be seated. Tomorrow we will send
15 in that note. I would hope that between now and tomorrow
16 morning counsel have gotten the exhibits together so that we
17 can send those in to the jury first thing in the morning.

18 MR. HUBBARD: Yes, sir.

19 THE COURT: In terms of counsel tomorrow I suppose it
20 makes sense to have counsel get here at 9:30 just to check in
21 so that we can go ahead and get these exhibits in. Other than
22 that counsel don't need to stay here in the courtroom. Just
23 make sure my deputy still has your cellphone so that we can
24 contact you if we get anymore notes. Anything else from
25 plaintiff today?

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1 MR. HUBBARD: Nothing from the plaintiff, your Honor.
2 Thank you.

3 THE COURT: Anything else from the defendant today?

4 MR. JACKSON: Just one thing, your Honor. Our
5 technology order has run out and we would ask if the Court
6 could extend our technology order by a couple of days.

7 THE COURT: Yes. That's fine.

8 MR. JACKSON: Thank you. I'm just going to pass this
9 up.

10 MR. BORTNICK: Obviously we would -- the same too. We
11 have a computer as well.

12 THE COURT: Same thing for you. Hand it to us. We'll
13 sign it.

14 MR. BORTNICK: Do you need to get a copy?

15 THE COURT: Yes. We have it, I believe. Anything
16 else from the parties today?

17 MR. JACKSON: No. Thank you very much.

18 THE COURT: See you at 9:30 tomorrow.

19 Again, counsel I believe have seen this. I've read
20 this note into the record. You can look at it. We'll give you
21 the copies of it tomorrow.

22 You've seen it. We'll give you copies tomorrow.

23 (Adjourned to December 15, 2016 at 9:30 a.m.)
24
25